Supreme Court, U.S.
FILED

No. 98-106 MAY 18 1998

OFFICE OF THE CLERK

In the.

SUPREME COURT OF THE UNITED STATES

October Term 1997

DORIS L. SASSOWER,

Petitioner,

- against -

HON. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have a duty to exercise its "power of supervision" where the record shows that two levels of the federal judiciary have so far departed from adjudicatory and ethical standards as to falsify the record to conceal petitioner's entitlement to a declaration that New York's attorney disciplinary law is unconstitutional, as written and as applied to her[1]?

   a. Does this Court have a duty under ethical codes of conduct to make disciplinary and criminal referrals when a Petition for Writ of Certiorari presents readily-verifiable evidence of official misconduct by federal judges?

2. Is constitutional due process denied where, on appeal, the Circuit Court fails to adjudicate the "pervasive bias" of the district judge, including his denial of a recusal motion under 28 U.S.C. §§144 and 455 and, additionally, fails to adjudicate, or to adjudicate with reasons, motions made for its own recusal, pursuant to §455 and the 5th Amendment to the U.S. Constitution?

   a. Is it misconduct *per se* for federal judges to fail to adjudicate or to deny, without reasons, fact-specific, fully-documented recusal motions?

   b. If so, where is the remedy within the federal judicial branch when §372(c) misconduct complaints against Circuit judges based thereon are dismissed as "merits related"?

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[1] These grounds of unconstitutionality of New York's attorney disciplinary law were particularized in petitioner's 1995 Petition for a Writ of Certiorari (*Sassower v. Mangano, et al.*, #94-1546) in connection with her state court challenge under New York's Civil Practice Law and Rules Article 78, which is part of the record in this §1983 action. The "Questions Presented" page from that Petition appears in the Appendix herein at A-117 and is incorporated by reference.

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Geyh, Charles Gardner, "*Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)*", Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I: 713-865 (1993)
Hjelmfelt, David C., *Statutory Disqualification of Federal Judges*, Kansas Law Review, Vol. 30: 255-263 (1982)

Petitioner, Doris L. Sassower, respectfully prays for a writ of certiorari to review the Summary Order of the U.S. Court of Appeals for the Second Circuit, entered on September 10, 1997.

OPINIONS BELOW

The Second Circuit's Summary Order is unreported and appears in the Appendix herein at A-21. The district court's Memorandum Opinion and Order is reported at 927 F. Supp. 113 and appears at A-36. The Order of the Second Circuit's Chief Judge, dismissing petitioner's incorporated-by-reference §372(c) complaints against the appellate panel and district judge is unreported and appears at A-28. The Second Circuit Judicial Council's Order denying petitioner's Petition for Review of the Chief Judge's dismissal Order is unreported and appears at A-31.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and this Court's Rule 10.1. The Second Circuit's Summary Order, affirming the district court's Judgment dismissing the action, was entered on September 10, 1997. Its Order denying petitioner's Petition for Rehearing with Suggestion for Rehearing *In Banc* was entered on December 17, 1997 [A-27]. Justice Ruth Bader Ginsberg granted petitioner's motion to extend her time to seek certiorari up to and including May 16, 1998.

CONSTITUTIONAL, STATUTORY, COURT RULE, AND ETHICAL PROVISIONS INVOLVED

U.S. Constitution, 5th, 14th Amendments; 28 U.S.C. §§144, 455, 372(c), 1927, 1254; 42 U.S.C. §§1983, 1985(3); F.R.Civ.P. 1, 11, 12, 56, 60(b); U.S. Supreme Court Rule 10.1; Second Circuit Judicial Council Rule 4 Governing §372(c) Complaints against Judicial Officers; S.D.N.Y. Civil Rule 3(g), S.D.N.Y. General Rule 4; N.Y.S. Judiciary Law §§90(2), (6), (8), N.Y.S. Appellate Division, Second Department Rules Governing the Conduct of Attorneys, 22 N.Y.C.R.R. §§691.4, 691.13(b)(1); Code of Judicial Conduct for U.S. Judges, Canon 3; ABA Code of Judicial Conduct, Canon 3; A.B.A.

Model Rules of Professional Conduct, Rules 8.3, 8.4.

STATEMENT OF THE CASE

This is an action under 42 U.S.C. §§1983 and 1985(3) for violation of civil rights, guaranteed by the 1st, 5th, 6th, 8th, and 14th Amendments of the U.S. Constitution. Petitioner, the plaintiff herein, challenges New York's attorney disciplinary law, as written and as applied to her. Respondents, defendants herein, are the judges of New York's Appellate Division, Second Department [herein "the judicial defendants"], their at-will-appointees, and the New York Attorney General [herein "the A.G."], all sued in their official and personal capacities. Until the events giving rise to the lawsuit, petitioner was "a distinguished...lawyer, lecturer, and writer...in continuous good standing at the bar for over thirty-five years" with a "thriving private practice, an outstanding career, and a national reputation based on her legal writings, her public advocacy in the area of equal rights and law reform, and her litigation accomplishments in both the private and public sector." [A-53, ¶14]

The material allegations of petitioner's Complaint are wholly expurgated from the Second Circuit's Summary Order and expurgated only slightly less from the district judge's Memorandum Opinion. Likewise, the true state of the record and course of the proceedings are obliterated and falsified by these judicial documents. These are, therefore, set forth in greater detail than would otherwise be necessary.

The Unexpurgated Verified Complaint [1]**:** Appellant's Complaint was verified. Summing up many of its most critical allegations was its paragraph "3": that on June 14, 1991, the judicial defendants issued an order suspending plaintiff's law license "immediately, indefinitely, and unconditionally":

> "without notice of formal charges, without a hearing, without a finding of probable cause, or any other

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[1] The following recitation is adapted, with only slight changes, from petitioner's Petition from Rehearing with Suggestion for Rehearing *In Banc* [A-197-201]. The full Complaint appears at A-49-100.

> findings, administrative or judicial, and without any jurisdiction whatsoever...[that they] knew such Order to be unlawful and fraudulent and that it was being rendered for political, personal, and private ulterior motivations, totally outside the scope of their judicial/official duties for the sole purpose of discrediting, defaming, and destroying Plaintiff to cause her to cease her activities in exposing judicial corruption." [A-50, ¶3]

Nearly 70 of the Complaint's allegations relate to the political context in which the judicial defendants issued, and thereafter perpetuated, the retaliatory "interim" suspension order. These include that the June 14, 1991 order [A-97] was served upon plaintiff the day before the last day to file the notice of appeal in the New York Court of Appeals in a public interest Election Law case in which plaintiff, as *pro bono* counsel, was challenging the manipulation of state judicial elections and judgeships by leaders of both major political parties [A-69, ¶103]. Prior thereto, on the day before plaintiff was scheduled to orally argue the Election Law case before the Appellate Division, Third Department [A-64, ¶78], the judicial defendants issued an October 18, 1990 order directing her to be medically examined to determine her mental capacity [A-132].

The Complaint alleged that each of these orders was factually baseless, fraudulent, and violated jurisdictional and due process requirements mandated by the very court rules under which they were issued. In particular, although those rules call for a petition to commence a plenary proceeding thereunder, neither the Grievance Committee's order to show cause for an order directing plaintiff to be medically examined under 22 NYCRR §691.13(b)(1) [A-16] nor its order to show cause under 22 NYCRR §691.4(l) [A-15] for an order directing her immediate suspension for her alleged failure to comply with the October 18, 1990 order were supported by any petition. Nor was there any underlying disciplinary proceeding to which the October 18, 1990 and June 14, 1991 orders related. The Complaint further alleged that plaintiff had contested each order to show cause and had additionally moved by orders to show cause of her own to vacate the October 18, 1990 and June 14, 1991 orders, but that the judicial defendants summarily denied her relief, without

findings or reasons. [A-62-68]. §691.4(l)(1) requires a specific "finding that the attorney is guilty of professional misconduct immediately threatening the public interest" and §691.4(l)(2) requires the court to "state its reasons for its order of suspension" [A-15-16].

New York's attorney disciplinary statute, Judiciary Law §90, vests original and exclusive control of attorney discipline in the state's Appellate Divisions. These courts have promulgated statutorily-unauthorized interim suspension rules, without provision for appeal, such as the judicial defendants' §691.4(l). As alleged in the Complaint's First Cause of Action for Declaratory Judgment [A-89], the New York Court of Appeals in *Matter of Nuey*, 61 N.Y.2d 513, (1984), explicitly recognized that §691.4(l) is statutorily unauthorized and in *Matter of Russakoff*, 72 N.Y.2d 520 (1992) -- also cited in the Complaint [A-75, ¶134] -- implicitly recognized that §691.4(l) is constitutionally infirm for lack of a post-suspension hearing provision. The Complaint further alleged that §691.4(l) is facially unconstitutional because it permits an attorney to be suspended for failure to comply with a court order ,with no requirement of wilfulness or *mala fides* [A-89, ¶217].

Both *Nuey* and *Russakoff* require immediate vacatur of interim suspension orders rendered without findings. Yet, as alleged, the judicial defendants denied, without reasons, plaintiff's repeated motions for vacatur based thereon and for a post-suspension hearing [¶¶134, 143, 148, 159, 165] -- disregarding her *a fortiori* showing of entitlement [A-77, ¶148]. In violation of plaintiff's equal protection rights, the New York Court of Appeals denied her leave to appeal, which it had previously granted to interimly-suspended attorneys Nuey and Russakoff [A-76, ¶144-5]. It also denied her appeal as of right.

The Complaint alleged that plaintiff was denied all appellate review of the judicial defendants' June 14, 1991 "interim" suspension order. She was also denied any independent review when the judicial defendants refused to recuse themselves from the special proceeding she brought against them under New York's CPLR Article 78 and decided it themselves. In so doing, the judicial defendants granted the dismissal motion of their own attorney, the A.G. -- a motion plaintiff had opposed as legally insufficient and factually perjurious [A-81-2]. Such dismissal, on jurisdictional grounds, was alleged to be a fraud. The A.G.'s litigation misconduct then continued as he opposed review by the New York Court of Appeals of his client's dismissal [A-87,

¶203]. The Complaint identified the A.G.'s complicitous and unethical conduct in the Article 78 proceeding as the basis for his being named a defendant [A-52, ¶10, A-55, ¶26].

The Complaint particularized a pattern of fraud, misrepresentation, and misconduct by the judicial defendants' appointee, defendant Casella, Chief Counsel of the Grievance Committee, not only as to the October 18, 1990 and June 14, 1991 orders [A-132, A-97], but as to a barrage of spurious unrelated disciplinary proceedings he filed against plaintiff at the judicial defendants' direction -- all without probable cause and without compliance with the express jurisdictional due process requirements of §691.4 [A-13-15]. None of plaintiff's challenges to defendant Casella's jurisdictionless, lawless, malicious, and invidious conduct resulted in any adjudications by the judicial defendants other than no-reason, no-finding orders, denying her relief.

The True Course of the District Court Proceedings[2]**:** Plaintiff was *pro se* throughout. Defendants were represented in both their official and personal capacities by the A.G., their co-defendant. Plaintiff requested, in the interest of judicial economy and because she did not have the A.G.'s resources to litigate on two fronts, that proceedings on her Complaint be held in abeyance pending this Court's decision on her Petition for a Writ of Certiorari from the New York Court of Appeals' order denying review of the judicial defendants' dismissal of her Article 78 proceeding. The district judge denied plaintiff's request after it was opposed, without reasons, by the A.G.

Nevertheless, the district judge granted the A.G.'s two requests for extensions of time to answer the verified Complaint. The A.G. then submitted an unverified Answer on behalf of all defendants, in which they collectively "den[ied]", "den[ied], upon information and belief", and "den[ied] knowledge and information sufficient to form a belief" as to most of the verified Complaint's allegations. Expressly "denied" were its allegations [A-54, ¶¶19-20] that the judicial

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[2] The following is an abridgement of the section entitled "The Course of the Proceedings Before the District Judge" from petitioner's Appellant's Brief (pp. 12-30). Such presentation to the Second Circuit -- in addition to being cross-referenced to the record -- was entirely undenied and undisputed by respondents.

defendants had general disciplinary jurisdiction under Judiciary Law §90(2) and that defendant Grievance Committee had general disciplinary jurisdiction under §691.4(a). As to the pleaded non-compliance by defendants with the explicit jurisdictional and due process requirements of Judiciary Law §90 and 22 NYCRR §§691.4 and 691.13(b)(1) [A-12-16], the A.G. referred the Court to those provisions for their terms. As to the significance of *Nuey* and *Russakoff*, he referred the Court to those cases for interpretation.

The A.G. moved to dismiss the Complaint under Rule 12(c) [A-8]. The motion consisted of a two-paragraph affidavit of the A.G., annexing unpublished decisions in four cases cited by his accompanying Memorandum of Law. The A.G.'s Memorandum of Law misrepresented the Complaint's pleaded allegations. It falsely asserted that: (1) the Complaint had alleged that plaintiff had been suspended "during an underlying disciplinary proceeding pending against her"; (2) that there was "no indication in the complaint that [the judicial] defendants were proceeding in the clear absence of all jurisdiction"; and (3) that the Complaint had not alleged that defendants' actions were "inconsistent with existing law or...violated plaintiff's 'clearly established statutory or constitutional rights of which a reasonable person would have known'". In reciting the Complaint's allegations, the Memorandum of Law omitted the allegations detailing the unlawful and unconstitutional manner in which the October 18, 1990 and June 14, 1991 orders were procured, as well as the unrelated disciplinary petitions. Omitted were the allegations that plaintiff was suspended without written charges, without reasons, and without any hearing prior thereto or thereafter. The Memorandum of Law did not discuss the jurisdictional and due process requirements of Judiciary Law §90 and 22 NYCRR §§691.4(l) and 691.13(b)(1) -- and made no mention of *Nuey* and *Russakoff*.

At the next scheduled court conference, the district judge, without hearing plaintiff, announced that the A.G.'s dismissal motion was "colorable" and required answering papers. He threatened plaintiff with contempt when she requested a "two-minute" inquiry into the A.G.'s motion and oral advocacy in connection therewith. Plaintiff asserted that such inquiry would dispense with the need for her and the Court to be burdened with the motion, which she contended was sanctionable under Rule 11.

Plaintiff's subsequent opposition to the A.G.'s dismissal motion included an application for Rule 11 sanctions. Points II-V of her Memorandum of Law [A-101-113] showed that defendants' pleaded defenses of 11th Amendment, *Rooker-Feldman*, collateral estoppel, abstention, and immunity all rested on the A.G.'s deliberate misrepresentation of the Complaint's factual allegations and of controlling law. Plaintiff's supporting affidavit annexed a critique of defendants' unverified Answer showing that more than 150 of their pleaded denials were false and in bad-faith. Plaintiff's opposing papers also requested that defendants' dismissal motion be converted under Rule 12(c) into one for summary judgment in her favor. She pointed out that defendants' dismissal motion failed to advance any interpretation contrary to the plain meaning of the statutory and court rule provisions under which the judicial defendants' disciplinary orders against her had been issued and that *Nuey*'s authority, which they did not deny or dispute, was controlling. To support her challenge to the constitutionality of New York's attorney disciplinary law, as written and applied, plaintiff annexed a copy of her Petition for a Writ of Certiorari for review of her Article 78 proceeding, relying on the arguments and legal authority set forth therein [A-118-131]. She also submitted a Rule 3(g) Statement [A-114], repeating, realleging, and reiterating the Complaint's allegations and specifically delineating the respects in which the judicial defendants' October 18, 1990 and June 14, 1991 orders were jurisdictionally void, procedurally violative, and fraudulent.

Defendants defaulted in responding. Plaintiff thereafter requested a date to present the district judge with an order to show cause for a preliminary injunction, with a temporary restraining order, for vacatur of the June 14, 1991 suspension order. It was nearly two months until the district judge provided her with a date to present it.

Plaintiff's preliminary injunction/TRO order to show cause sought to enjoin continued enforcement of the findingless June 14, 1991 suspension order, based on *Nuey* and *Russakoff*, and to enjoin the judicial defendants from continuing to adjudicate cases involving plaintiff. Additionally, it sought to vacate the February 27, 1992 order of the Southern District of New York suspending plaintiff's law license [A-134] -- an order issued by the Southern District, without a hearing, in violation of its own Rule 4(g) [A-11], which plaintiff had invoked [A-135-142].

At the presentment of plaintiff's order to show cause, the district judge purported to be ignorant of the most basic facts relevant to her suspension -- all recited in the papers before him. His only reaction to plaintiff's oral recitation of the litany of due process and equal protection violations of her rights by the state defendants and the retaliatory political context of her suspension was to assert that lower federal courts lack subject matter jurisdiction to review state court decisions even where a complaint alleges corruption by state judges -- which legal proposition plaintiff disputed.

The A.G. offered no opposing argument, other than to adopt the district judge's statement that plaintiff's sole remedy was in the U.S. Supreme Court. The district judge *sua sponte* raised abstention and laches defenses and refused to sign plaintiff's order to show cause so as to require responding papers from defendants. Over plaintiff's objection, he also relieved defendants of their default, without any motion, based upon the A.G.'s misrepresentations and his own speculation.

Plaintiff immediately ordered the transcript. Less than two weeks after its receipt, she hand-delivered an order to show cause for the district judge's recusal, pursuant to 28 U.S.C. §§144 and 455 [A-2-3]. It chronicled the district judge's pervasive actual bias throughout the proceeding, culminating in his conduct at the oral argument, as to which it showed, by the district judge's own decision in *Mason v. Departmental Disciplinary Committee*, 1989 WL 99809 (S.D.N.Y.), that he had misrepresented the law as to subject matter jurisdiction and abstention. This, in addition, to his having relieved defendants of their default, without papers or good cause shown [A-148].

Meantime, the A.G. had filed defendants' opposition to plaintiff's summary judgment application. It consisted of: (1) a 2-1/4 page affidavit of defendant Casella, which did not deny or dispute any of the Complaint's allegations or plaintiff's Rule 3(g) Statement or that defendants' Answer was knowingly false in its responses to more than 150 of the Complaint's allegations; (2) a Statement in Opposition to plaintiff's Rule 3(g) Statement, in which the A.G. asserted that defendants' dismissal motion was "dispositive", but, if denied, that "defendants reserve the right to move for summary judgment at a future time"; and (3) a 2-1/2 page Memorandum of Law devoted only to the sanctions issue, in which the A.G. cited no law and did not deny or dispute that defendants' Answer was fraudulent and that their

dismissal motion misrepresented the Complaint's allegations and controlling law.

At the oral argument, the district judge summarily limited plaintiff to "five minutes" to argue her recusal order to show cause, delivered to him the day before, and refused to accept her supporting Memorandum of Law. The A.G. presented no argument. Without signing plaintiff's order to show cause, the district judge denied recusal under both §§144 and 455 as "untimely" and as "insufficient" because the bias alleged related to his conduct in the proceeding [A-145].

The district judge then allowed the A.G. to argue his dismissal motion. Arguing against the Complaint's pleaded allegations, the A.G. insisted that this was "without reverting to a summary judgment motion". When specifically asked by the district judge "...She said she was deprived of a hearing. Do the statutes provide for no hearing?", the A.G. declined to discuss "what the state disciplinary rules say" [A-172].

In opposition, plaintiff reiterated her Rule 11 sanctions request against the A.G. for the persistent misrepresentations in his oral advocacy. The district judge gave her no opportunity to argue her summary judgment and other sanctions applications and, initially, would not permit her to submit an affidavit for further sanctions under Rule 56(g) [A-9] for defendant Casella's bad-faith 2-1/4 page affidavit in opposition to her summary judgment application.

The district judge's ensuing order, in addition to erroneously reciting the nature of the submissions before him and omitting entirely any mention of plaintiff's sanctions applications, *sua sponte*, directed plaintiff to submit copies of all documents from the state disciplinary file. Plaintiff's prompt letter response objected that his inaccurate recitation of the submissions was material and potentially prejudicial to her rights. She stated that she was "not averse to providing a copy of the state court disciplinary file", but asked clarification as to the purpose and legal authority for the district judge's *sua sponte* direction that she do so. She objected that if defendants' dismissal motion raised extraneous issues which could not be adjudicated on the motion papers, it had to be denied, *as a matter of law*, since "[i]t is the movant who has the burden of supporting his motion with such substantiating documents as may be appropriate, and defendants have failed to meet that burden.". Plaintiff pointed out there had been "*no*

evidentiary or testimonial opposition" to her summary judgment application. As to her yet unsigned preliminary injunction/TRO order to show cause, she reiterated *Nuey* and *Russakoff* as dispositive of her right to immediate vacatur of the June 14, 1991 findingless suspension order [A-97].

Neither the district judge nor the A.G. responded. Ten weeks later, plaintiff wrote again to the district judge, still with no response. Two weeks later she wrote again, contrasting the district judge's failure to respond to her letters seeking clarification of his facially-erroneous order with his Chamber's immediate response to the A.G., who -- following receipt of her previous letter -- was able to immediately obtain a variety of dates to present a Rule 41(b) sanction motion against her for "not cooperating" with that order and, thereafter, permission to file such motion without a pre-motion conference. Plaintiff also complained of the "irreparable prejudice" caused her by the district judge's inaction on her preliminary injunction/TRO order to show cause, requesting that if it were not granted, her letter be accepted as renewal of her recusal motion. She annexed a note from her physician confirming an incapacitating condition of her right hand, disabling her from typing. Plaintiff sent a copy of her letter to the chief judge of the Southern District, an indicated recipient. The district judge responded by order, which, without reasons, denied her unopposed request to proceed by letter.

Plaintiff thereupon moved for reargument, reconsideration, and renewal of her recusal order to show cause, particularizing the district judge's continuing course of abusive conduct and annexing a transcript of the prior oral argument. As part thereof, plaintiff also sought an injunction, as well as sanctions against defendants and the A.G. Simultaneously, the A.G. moved to dismiss the Complaint pursuant to F.R.Civ.P. 41(b) based on plaintiff's alleged failure to comply with the district judge's order to produce the state disciplinary file and her alleged failure to prosecute the action.

Plaintiff sent a copy of her motion to the Southern District chief judge under a cover letter requesting that he invoke his "supervisory power over a district judge whose manifest bias has caused him to run amok". Seven weeks later, with no response, she again wrote the chief judge, suggesting his inaction might be due to his conflict of interest, since he was the judge who issued the February 27, 1992 order suspending her federal law license in the Southern

District, without a hearing [A-134] -- vacatur of which was part of her preliminary injunction order to show cause. Plaintiff requested her letter to him be accepted "in lieu of a formal motion for [his] recusal" and that the case be referred to a judge able to impartially discharge supervisory duties. Three weeks later, with no response from the chief judge, the district judge issued his Memorandum Opinion and Order [the "Decision"] [A-36] and Judgment [A-34].

The District Judge's Decision [A-36]: By his Decision, the district judge omitted the fact that plaintiff's recusal motion, which he had denied as "untimely" and "insufficient", had been made pursuant to 28 U.S.C.§455, not just §144 [A-43]. After misrepresenting the basis upon which plaintiff had moved for reconsideration thereof, he denied that motion [A-43]. *Sua sponte* and without notice, he converted defendants' dismissal motion -- the subject of plaintiff's sanctions applications -- to one for summary judgment in their favor, stating, falsely, that both parties had filed "voluminous affidavits" [A-42, fn.3]. In fact, the only affidavits submitted by defendants was defendant Casella's 2-1/4 page affidavit -- the subject of plaintiff's Rule 56(g) sanctions application [A-163]. Without reasons, the district judge denied plaintiff's summary judgment application, misrepresenting it as a "cross-motion" [R-42]. He also denied, without reasons, plaintiff's order to show cause for preliminary injunction, likewise misrepresenting it as a "cross-motion" [A-42]. In view of his dismissal of plaintiff's action, the district judge stated there was no need for him to consider defendants' Rule 41(b) motion [A-48]. As to plaintiff's documented and uncontroverted applications for sanctions against defendants and the A.G. for litigation misconduct and fraud, the district judge not only did not adjudicate them, he omitted any mention of them from his Decision. At the same time, his Decision replicated the stratagem of misconduct those applications had protested: stripping the Complaint of its defense-vitiating material allegations.

Appellate Case Management Phase: Plaintiff -- now appellant -- insisted on a pre-argument conference when originally-assigned Second Circuit staff counsel, thereafter recusing himself on her bias objection, dispensed with it. The order directing the conference required attorneys attending to be knowledgeable about the case and

have authority to settle or narrow issues. The attorney who had handled the case in the district court for the A.G. did not appear. Instead, the A.G. sent an attorney unfamiliar with the case, with no authority to agree to the most minimal and legally-compelled stipulations, such as amending the caption to reflect successor parties, as proposed by staff counsel.

At the conference, appellant asked the A.G. to join in a Rule 60(b) motion to vacate for fraud the district judge's Judgment or to join in the appeal, which she requested be transferred to a different Circuit. She also requested his consent to immediate vacatur of her suspension pursuant to *Nuey and Russakoff* and discussed his conflicts of interest as a named defendant, representing himself and his co-defendants in both their official and personal capacities. Although staff counsel directed the attorney appearing for the A.G. to obtain a response from her superiors, none was forthcoming. Thereafter, the attorney who had handled the case in the district court resurfaced for the appeal. He refused to discuss anything and, without reasons, would not consent to any of the proposed stipulations. Appellant's efforts to obtain oversight from his superiors -- including from the A.G. personally -- were rebuffed by the A.G.'s office with the statement that said attorney was doing "a good job". This led to appellant's omnibus motion for contempt and sanctions against the A.G. for "fraudulent and frivolous conduct in defeating the purposes of...[the] pre-argument conference".

Prefacing appellant's supporting affidavit was a request that the Circuit *sua sponte* recuse itself for bias and transfer the motion to a judge outside the Circuit. Appellant particularized that bias, apparent as well as actual [A-187-191]: (1) the Circuit judges' personal and professional relationships with the high-ranking state judges named as defendants or implicated in their misconduct; (2) appellant's familial relationship with George Sassower[3], with whom the Circuit has a widely-publicized, long-standing, and bitterly adversarial relationship, arising from his "avalanche" of lawsuits and judicial misconduct complaints against its judges[4]; and (3) appellant's

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[3] She had been married to him for 32 years, with 3 children together.

[4] So described by the New York Law Journal [A-187, fn.3] in a front-page article (3/14/94) reporting on the decision, *In re George Sassower*, 20 F.3d 42

own publicly adversarial relationship with the Circuit, stemming from its judicial retaliation against her in the case of *Sassower v. Field*[5] because of her familial relationship with Mr. Sassower [A-187-191]. Appellant also pointed out [A-189-190] that it was on the day preceding oral argument of her appeal in *Sassower v. Field* that the Southern District, in violation of its own Rule 4(g), which she had invoked, issued the February 27, 1992 order suspending her federal law license [A-134].

None of appellant's particularized allegations of the A.G.'s misconduct in the case management phase of the appeal were denied or disputed. Nor did the A.G. deny or dispute the facts giving rise to appellant's recusal request -- or that they created the proscribed appearance of impropriety. Appellant's reply affidavit highlighted this and that the A.G.'s bad-faith and fraudulent opposition reinforced the need for sanctions.

(2nd Cir. 1994) by the Second Circuit's Chief Judge on behalf of the Second Circuit Judicial Council, citing back to an earlier decision about Mr. Sassower by the Chief Judge for a three-judge panel, *In re Martin-Trigona*, 9 F.3d 226 (2nd Cir. 1993), also reported on the front-page of the Law Journal (11/9/93). Appellant's Reply Affidavit specified that the basis for Mr. Sassower's lawsuits and complaints is his claim that the Circuit's judges author fraudulent decisions to cover up corruption in the New York State judiciary, in which the State Attorney General is a collusive participant. *See* Petition for Rehearing with Suggestion for Rehearing *In Banc* [A-205].

[5] *Sassower v. Field* was the subject of a Petition for a Writ of Certiorari to the U.S. Supreme Court (#92-1405). In a Supplemental Petition for Rehearing, precipitated by the Court's granting of review to *Liteky v. U.S.*, *infra*, to interpret 28 U.S.C. §455(a), appellant identified the Second Circuit's *animus* against Mr. Sassower as the motive behind its retaliatory decision in *Sassower v. Field*. In that decision, a Second Circuit appellate panel, *sua sponte* and without notice, invoked the "inherent power" of the district judge in the case to uphold a $100,000 sanctions award against appellant on a record devoid of any sanctionable conduct by her. Such award was in favor of fully-insured defendants, to whom it was a "windfall", and whose litigation fraud and misconduct appellant had documented in an uncontroverted Rule 60(b)(3) motion against them, which was part of her appeal. The Circuit became complicitous in the appellate panel's decision by its denial of appellant's Petition for Rehearing with Suggestion for Rehearing *En Banc* and, several years later, by its factually and legally insupportable dismissal of her §372(c) misconduct complaint against its judicial author, by then its Chief Judge.

Immediately upon learning the identity of the panel assigned to the recusal/sanctions motion, appellant filed a further affidavit in which she asserted that its presiding judge was disqualified by reason of her direct participation in events identified by the motion as demonstrating the Circuit's actual bias.

The response of the panel, from which such disqualified judge did not recuse herself as presiding judge, was a one-word denial of the motion in its entirety, without reasons [A-32].

The Appeal: Appellant's Brief presented a sole transcending issue: the district judge's disqualifying "pervasive bias", "as evidenced by the course of the proceedings and the subject Decision" [A-143]. The Brief opened by asserting that the appeal was "not about good-faith error by the District Judge, but about a willful course of behavior", protecting the defendants who had no legitimate defense to the Complaint's material allegations, all substantiated by uncontroverted evidentiary proof. It concluded by requesting disciplinary and criminal referral of the district judge, as well as of defendants and the A.G. for fraud and obstruction of justice. In between, the Brief gave record references establishing that the Decision wholly misrepresented and falsified the course of the proceedings and the allegations of the Complaint. Its five-point legal argument demonstrated that the district judge's rulings and failures to rule on the motion submissions before him were all egregious and unsupported, both factually and legally. Point I argued that appellant's order to show cause for recusal and her reargument/renewal motion met the standard set by *Liteky v. U.S.*, 510 U.S. 540 (1994) [A-145-151]. Point II showed that the district judge's failure to rule on appellant's uncontroverted, fully-documented sanctions applications against defendants -- which he obliterated from the Decision -- was because doing otherwise would have exposed the very allegations of the Complaint which vitiated defendants' pleading defenses [A-152-162]. The Brief demonstrated the deliberateness with which the district judge, in his Decision, followed the defense stratagem of obliterating and falsifying these allegations. It annexed, as an appendix, a line-by-line analysis of the Decision's recitation of the Complaint, compared with the Complaint itself [A-177].

Point VB [A-166-176] highlighted that there was "not a scintilla of evidence" to support the district judge's *sua sponte*,

without notice, summary judgment to defendants -- and that the Decision identified no evidence of defendants' compliance with the jurisdictional and due process prerequisites of Judiciary Law §90 and NYCRR §§691.4 and 691.13(b)(1), which the Complaint had specifically alleged they had wilfully violated as to the medical examination order, the suspension order, and the unrelated disciplinary proceedings. It showed that defendants had not even purported compliance with these prerequisites. Nor could they, since their Answer -- the subject of one of appellant's unadjudicated sanctions applications -- had deferred to the Court for its interpretation of New York's attorney disciplinary law and of *Nuey* and *Russakoff*. Yet, as the Brief pointed out, the Decision did not interpret either §691.13(b)(1), the rule under which the examination order was issued, nor §691.4(l), the rule under which appellant was suspended, which it misrepresented as §691.13(b)(1)[6]. Nor did the Decision answer, address, or otherwise refer to the specific question that the district judge had asked the A.G. at the oral argument, *viz.*, whether the disciplinary law provided for "no hearing" [A-172]-- even though appellant's suspension, without a hearing, was the only violation which the Decision identified as alleged by appellant [A-37]. Nor did the Decision, which omitted any mention of *Nuey*, interpret *Russakoff*, which answered the question about no hearing provision [A-39].

Point VI(B) further pointed out [A-169] that special considerations govern §1983 actions asserting free speech claims, such as at bar, and that, notwithstanding *Rooker-Feldman*'s inapplicability by reason of the Complaint's material allegations of state court bias and due process denials, appellant's challenge to New York's attorney disciplinary law, as written, was not, as the Decision claimed, "inextricably intertwined" with her as-applied challenge [A-44-45]. Also noted was that the appeal presented an important opportunity for the Circuit to clarify the meaning of "inextricably intertwined" and to explore whether the *Rooker* doctrine was an anachronism [A-173-174].

Not a single fact or legal argument in the Appellant's Brief

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[6] This, in addition to misrepresenting the plain meaning of Judiciary Law §90(2) and 22 NYCRR §691.4(e)(5) so as to confer upon defendants Second Department and Grievance Committee the general disciplinary jurisdiction, which their Answer expressly denied [A-170]

was denied or disputed by respondents, whose Opposing Brief did not even refer to the Brief. Instead, the A.G. argued for affirmance by repeating the Decision's expurgated recitation of the Complaint -- including its misrepresentations[7] -- and by omitting from his presentation any reference to the district judge's *sua sponte*, without notice procedure for awarding defendants summary judgment based on their non-existent "voluminous" affidavits. Appellant's Reply Brief highlighted this and sought maximum sanctions under Rule 11 and 28 U.S.C. §1927, as well as disciplinary and criminal referral of defendants and their counsel for engaging in the same kind of litigation fraud on appeal as they had in the district court.

The Oral Argument[8]***:*** Appellant, who requested 20 minutes for oral argument, was given 5 minutes -- the least of any appeal on that day's calendar. Within the first minute, the Circuit panel judges interrupted appellant's prepared presentation with superficial

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[7] This included the Decision's false statements that the June 14, 1991 order suspending appellant's law license was pursuant to §691.13(b)(1) and that such suspension was pending her compliance with the October 18, 1990 order directing her to be medically examined. Appellant's uncontroverted Brief had set forth the true facts: The suspension order was pursuant to §691.4(l) and was unconditional -- as shown by the order itself, annexed to the Complaint [A-97]. Likewise repeated by the A.G. was the Decision's misrepresentation that the June 14, 1991 suspension order became "final" after the New York Court of Appeals denied leave to appeal the judicial defendants' dismissal of her Article 78 proceeding, cross-referencing her cert petition. Appellant's Brief had pointed out that the cert petition made no such assertion and emphasized throughout that the June 14, 1991 order is a "non-final", "interim" order.

[8] Two days before oral argument, the Center for Judicial Accountability, Inc. (CJA), the national, non-partisan, non-profit citizens' organization of which petitioner is co-founder and director, ran a public interest ad in the New York Law Journal, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", inviting the public to attend [A-261]. The ad was subsequently annexed to petitioner's recusal/Rule 60(b) vacatur for fraud motion. CJA's prior ad, "*Where Do You Go When Judges Break the Law?*", referred to therein as having been printed on the Op-Ed page of New York Times (10/26/94) and, thereafter, in the New York Law Journal (11/1/94)) [A-269], was part of the record before the district judge [R-606] -- relevant because it highlighted the Complaint's material allegations.

questions, charged against her time. Appellant's answers reiterated the record: that she had had no full and fair opportunity to litigate in the state forum, that her law license had been suspended without a petition, findings, reasons, a pre- or post-suspension hearing, and right of appeal; that the judicial defendants had subverted her Article 78 remedy by refusing to recuse themselves, that the suspension order was a fraud and judicial retaliation against her for exposing political manipulation of state judicial elections, and that the attorney disciplinary law was unconstitutional for failing to provide a right of appeal to interimly-suspended attorneys. Appellant reiterated her objection that the Circuit was disqualified for bias, as particularized in her prior motion [A-187-191]. From such oral recusal application, the presiding judge cut her off, mid-sentence, with no ruling, threatening to have her removed from the courtroom if she continued and refusing to allow her to offer a copy of her written statement, which she had been prevented from delivering as her oral argument.

***The Appellate Panel Summary Order* [A-21]**: Less than two weeks after oral argument, the appellate panel issued a not-for-publication Summary Order, signed by each of its three judges. It did not rule on appellant's recusal application -- nor even identify such application as having been made. None of the material facts presented by appellant at oral argument were included in the Summary Order -- although additionally alleged by the Complaint and documented by the record. Indeed, the Summary Order never once cited to the Complaint or the record. Its only citations were to the district judge's Decision, which it praised as "cogent", relying on its recitation of "the complex facts and procedural history of [the] case". The Summary Order also did not rule on or identify the sole transcending issue presented by appellant's Brief: the district judge's "pervasive bias". It expressly stated that it was not addressing the district judge's adjudications of the motion-submissions before him [A-24] -- all of which appellant had challenged as establishing that bias. Nor did it address or identify appellant's sanctions applications against defendants and the A.G. for their litigation misconduct on the appeal and in the district court.

Instead, the panel fashioned its own *sua sponte* without-notice

dismissal of appellant's Complaint -- presumably on the pleading[9], based on unidentified and non-existent state court "judgments" [A-25], which it falsely claimed had deprived appellant of her law license. As to these, it made no finding of jurisdiction, due process, or anything else. Such dismissal, for lack of subject matter jurisdiction under *Rooker-Feldman* and on unspecified preclusion principles, had been shown by appellant's Brief to be inapplicable to the Complaint's material allegations -- all of which the Summary Order expurgated, together with her arguments related thereto. Appellant's specific arguments on *Rooker-Feldman* [A-172-174], which the Summary Order purported to identify [A-25], were truncated to delete any mention of §691.4(l) [A-15], the facially-unconstitutional rule under which appellant was suspended by the judicial defendants' June 14, 1991 "interim" order [A-97], and of *Nuey* and *Russakoff*. Indeed, the Summary Order made no reference to any of the judicial defendants' attorney disciplinary rules or to the specific grounds for appellant's challenge to New York's attorney disciplinary law, as written and as applied to her.

***Appellant's Petition for Rehearing with Suggestion for Rehearing In Banc* [A-192]:** The issue presented by appellant's Petition for Rehearing with Suggestion for Rehearing *In Banc* was "the integrity of the judicial process". It posed the question: "...whether -- and to what extent -- appellate review and 'peer disapproval' are 'fundamental checks' of judicial misconduct, as claimed by the National Commission on Judicial Discipline and Removal in its 1993 Report -- and whether a remedy for such judicial misconduct exists under 28 U.S.C. §372(c)". The Petition asserted that the Circuit's answer would "demonstrate whether judicial discipline should be reposed, as it presently is, in the Circuit". A footnote stated that a presentation was being prepared for the House Judiciary Committee to remove judicial discipline from the federal judiciary [A-192].

The Petition particularized that the panel's Summary Order, like the district judge's Decision, was the product of judges who had wrongfully failed to recuse themselves for bias and who had used their

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[9] Yet the Summary Order "affirmed" [A-22] the district judge's Judgment, which disposed of the motion-submissions by, *inter alia*, granting summary judgment to defendants [A-34].

judicial office to protect the high-ranking judicial defendants and the A.G., who had freely engaged in litigation misconduct, including fraud, because they had no legitimate defense to the Complaint's material allegations -- obliterated by the Summary Order and Decision. The Petition incorporated by reference: (1) a fact-specific, documented motion to recuse the panel and Circuit, pursuant to 28 U.S.C. §455 and the 5th Amendment, to which was joined a motion to vacate for fraud the panel's Summary Order and the district judge's Judgment, invoking Rule 60(b)(3), (6), and the Court's inherent power [A-206]. Annexed to appellant's 43-page supporting affidavit was a transcript of the oral argument before the appellate panel and a line-by-line analysis of the Summary Order, as compared with the record, establishing it to be a fraud; [A-221]; and (2) fact-specific, documented §372(c) judicial misconduct complaints against the appellate panel [A-251] and district judge [A-242] for their protectionism of the state defendants and their failure to recuse themselves for bias. The complaints also specified the grounds for the Circuit's recusal for bias and self-interest [A-243-245, A-255-258]. As to the Circuit's Chief Judge, the complaints asserted that he was "absolutely disqualified", identifying his direct participation in *Sassower v. Field* [A-251, A-247]. Petitioner requested that any question as to the Circuit's duty to transfer the complaints and the federal judiciary's duty to investigate them be certified to the U.S. Supreme Court, pursuant to 28 U.S.C. §1254(2) [A-251]. As to appellant's entitlement to a §372(c) investigation, the complaints asserted that allegations of biased, bad-faith conduct are not "merits-related", that even "merits-related" complaints are not required to be dismissed under the §372(c) statute, and that the discretion to review "merits-related" complaints "is particularly warranted where judicial and appellate remedies are unavailable -- or, as at bar, unavailing by reason of the protectionism and self-interest complained of." [A-247]. The complaints stated that in the absence of judicial/appellate remedies in the Circuit, any order dismissing the complaints on "merits-related" grounds should define "merits-relatedness" in the context of complaints alleging bad-faith, biased conduct that is egregious, including clarification of the relationship between disciplinary and judicial/appellate remedies. The complaints concluded with the assertion:

> "Should it be maintained that the sole avenue for review of deliberate, on-the-bench misconduct by Circuit judges is in the U.S. Supreme Court -- then the dismissal order should state as much so that the Supreme Court can more fully appreciate -- and make appropriate provision for -- its transcendant appellate and supervisory obligation...." [A-260]

Defendants filed no response. The Circuit's response was as follows: In a one-word order, unsigned by any judge, appellant's recusal/Rule 60(b) vacatur for fraud motion was denied, without reasons [A-33]. The Circuit Chief Judge dismissed her §372(c) complaints in an order [A-28] which failed to address, or even identify, that the complaints had asserted that he and the Circuit were disqualified for bias and self-interest. His dismissal, on "merits-related" grounds, was without any reference to the facts presented in the complaints as bearing upon appellant's entitlement to disciplinary review. Omitted was the fact that the district judge's bias had not been adjudicated by the appellate panel and that the panel had itself had been the subject of a recusal application, which it had not adjudicated and then not adjudicated with reasons when it denied appellant's recusal/Rule 60(b) vacatur motion [A-33]. Likewise omitted was all mention of appellant's post-appeal judicial proceedings -- and their outcome, including the Circuit's failure to request a vote on appellant's Petition for Rehearing with Suggestion for Rehearing *In Banc* in the very period the complaints were pending [A-27]. No venue for review of the purportedly "merits-related" judicial misconduct was identified by the Chief Judge's dismissal order. This was highlighted by appellant's Petition for Review to the Second Circuit Judicial Council [A-272], which particularized the innumerable respects in which the Chief Judge's order was factually and legally dishonest and *prima facie* proof of his disqualifying actual bias and self-interest [A-282-292]. Appellant reiterated her request that any question as to the Circuit's duty to transfer the §372(c) complaints and the federal judiciary's duty to investigate them be certified to this Court [A-292-293]. The Circuit Judicial Council responded by denying the Petition "for the reasons stated in the order of the Chief Judge" [A-31] and advised appellant "there is no further review".

REASONS FOR GRANTING THE WRIT

This petition is not about judicial error or good-faith decision-making by Second Circuit judges. It is about the Second Circuit's corruption of the judicial process, the appellate process, and the §372(c) disciplinary process -- to such a degree that all adjudicatory and ethical standards have been wiped out. The "Statement of the Case" only summarizes the subversion of the rule of law that has occurred on the district and circuit levels. Yet, it suffices to show that what is involved is criminal conduct by federal judges. Their decisions, when compared to the record, are readily verifiable as frauds and *prima facie* evidence of their disqualifying actual bias, for which their disqualification had been sought.

Such conduct, undermining the integrity of the judiciary and public confidence, would be egregious in any case. It is all the more so in a civil rights action under 42 U.S.C. §1983 -- a remedy specifically created by Congress to protect citizens from having their constitutional rights trampled on by government officials, acting "under color" of state law.

The whole purpose behind "lifetime" tenure for federal judges is to provide them with a maximum of judicial independence so that they can fearlessly address constitutional violations, even when committed by high government officers -- including judges. Yet, here, both the Second Circuit and the district judge used their "lifetime" judicial offices not to examine the allegations of lawless and retaliatory conduct by state officials -- as was their solemn duty -- but to conceal the heinous violations petitioner's verified Complaint alleged and her uncontroverted evidentiary proof substantiated. They thereby protected those state defendants from the absolute liability they faced for their constitutionally-tortious and corrupt conduct, the gravamen of the Complaint.

The state defendants' conscious knowledge of that liability is clear from the litigation strategy they employed, resting on fraud [A-152]. Such misconduct was wholly endorsed by the lower federal courts, which not only failed to take corrective steps on their own initiative under Rule 11(c)(1)(B) [A-7] or by exercise of inherent power, but failed to adjudicate petitioner's documented and uncontroverted sanctions applications, whose very existence, like the allegations of the Complaint, they obliterated from their decisions [A-

202, A-242, A-253].

The fact that the state defendants protected by the district judge and Circuit include high-ranking state judges only reinforces the public perception that "judges cover up for judges". This case is "EXHIBIT A" for that viewpoint. It shows not only how federal judges cover-up for state court judges, sued in §1983 actions, but how federal judges cover up for federal judges, whether their misconduct is raised by recusal motions, by appeal, by §372(c) disciplinary complaints, or by monitoring requests to supervisory judges.

As such, this case allows the Court to confront that legitimate public perception and do so in a way that is meaningful -- by reinforcing and clarifying the recusal statutes under 28 U.S.C. §§144 and 455 (*see* Point II, *infra*) and by articulating the operative principles for disciplinary review under 28 U.S.C. §372(c). Indeed, as to §372(c), only in the rarest case, such as this, where the §372(c) judicial misconduct complaints are incorporated into the record before the Circuit and are an integral part of the questions raised in a petition for rehearing before it, would this Court have the opportunity to give guidance to the Circuits on summarily-dismissed §372(c) complaints. The Circuits are in dire need of guidance from this Court. In the 18 years since Congress enacted §372(c), they have not developed any case law on the interface between appellate and disciplinary remedies, or defined the "merits-related" ground for dismissal under §372(c), or the discretion afforded by the statute to review even "merits-related" complaints [A-4]. The deliberateness with which they have not done so -- leaving the "merits-related" category vague so as to dump virtually all complaints on that ground and promulgating statutorily-violative implementing rules [A-10] -- is underscored by the Second Circuit's disposition of the §372(c) complaints herein, where petitioner expressly challenged it to address these threshold issues.

Once this Court reinvigorates these critical statutory remedies, whose purpose, before they were judicially-gutted, was to enhance judicial integrity and public confidence, it can move on to the merits of this §1983 action so as to resuscitate that civil rights statute. This includes articulating, loud and clear, the predicate facts that must exist for invocation of defenses that are routinely used, without essential findings of those predicate facts, to toss out §1983 actions -- as well as re-examining some of these defenses, among them, judicial immunity -- particularly where appellate remedies are unavailable or

subverted [A-110] -- and whether changed times and circumstances warrant reformulation of the *Rooker* doctrine [A-174]-- both of which have resulted in federal and state judicial unaccountability at bar.

The Court will also, at long last, be able to address the unconstitutionality of New York's attorney disciplinary law. Nearly 25 years ago, Judge Jack Weinstein dissented from a 3-judge district panel in *Mildner v. Gulotta*, 405 F.Supp. 182, 191 (E.D.N.Y 1975), to hold it unconstitutional. As stated in petitioner's prior Petition for a Writ of Certiorari, the pertinent extracts from which are included in the Appendix herein [A-118-131],

> "[t]his Court affirmed *Mildner*, without opinion, on the issue of abstention -- never reaching the transcendent issues as to the constitutionality of Judiciary Law §90. Yet, Justices Marshall and Powell apparently agreed with the view of concurring Judge Moore of the District Court that 'the constitutional question is of sufficient importance to be resolved by our highest court...' (at 199). This Court's Memorandum Decision in *Mildner* shows that those two justices wished to 'postpone consideration of the question of jurisdiction to a hearing of the case on the merits.' 425 U.S. 901 (1976)." [A-118]

This case is the right vehicle to address definitively the constitutional issues not there addressed because there were no bias claims against the state tribunal. As graphically depicted by the verified Complaint [A-49], those claims are here present in profusion.

POINT I

A. This Court's Power of Supervision is Mandated

Under its Rule 10.1, this Court has a "power of supervision" to grant review "when a United States court of appeals...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court...".

Because this case meets that standard on both counts, the *pro se* petitioner has perfected this Petition for a Writ of Certiorari, at

great effort and expense. She has done this so that the Court may breathe life into the recusal and disciplinary statutes -- *before* Congress does so in ways more sweeping and less deferential to judicial independence. Based on the record herein, which is already before the House Judiciary Committee [A-301][10], there can be no argument for reposing federal judicial discipline within the federal judicial branch, absent this Court's decisive action. All available formal and informal checks on judicial misconduct, identified by the 1993 Report of the National Commission on Judicial Discipline and Removal as existing within the federal judicial branch, were utilized by petitioner and shown to be sham. Nor is there any check provided by the Judicial Conference, the very zenith of the federal judiciary. Its Administrative Office, to whom petitioner supplied the record of this case for presentment to the appropriate committees of the Judicial Conference for oversight intervention, has not only refused to make such presentment, but fails to respond to letters or return phone calls [A-308-310]. So much for "self-policing" by the federal judiciary.

Petitioner's assertions of corruption in the Second Circuit, covering up corruption in the New York state judiciary and in the office of the New York State Attorney General, are not lightly made. They are made with full cognizance of her legal and ethical obligations to this Court -- as to which she remains in good standing.

To assist the Court in assessing its duty to review this case under its "power of supervision", the Appendix herein has been expanded with pertinent documents from the record, beginning with petitioner's verified Complaint [A-49], presented in full. The wholesale obliteration and falsification of its material allegations by the district judge and Circuit panel are evident from the most cursory reading of the Complaint, even unaided by petitioner's line-by-line analyses, which are also included [A-177, A-221]. The Table of Contents herein inventories the other included documents, among them, extensive portions of petitioner's Appellant's Brief, a full copy of her Petition for Rehearing with Suggestion for Rehearing *In Banc*, and of her §372(c) misconduct complaints -- including her Petition for

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[10] The record has also been presented to the Commission on Structural Alternatives for the Federal Courts of Appeals, as part of a testimonial presentation (4/24/98 NYC), accessible on the Commission's website: *www.app.comm.uscourts.gov/* .

Review by the Second Circuit Judicial Council. These demonstrate the Second Circuit's annihilation of anything resembling judicial/appellate/disciplinary processes, compelling this Court's "power of supervision". Any doubt should be resolved by requisitioning the record, which, since the case was "dumped" in its pre-discovery stage, is not unduly voluminous.

B. This Court has a Duty to Make Disciplinary and Criminal Referrals

All ethical codes for judges and lawyers include the obligation to bring judicial and attorney misconduct to the attention of appropriate authorities: Code of Conduct for U.S. Judges, Canon 3B(3)[11], ABA Code of Judicial Conduct, Canon 3D, ABA Model Rules of Professional Conduct, Rule 8.3 [A-17-20].

Consequently, were this Court to turn its back on its supervisory duty herein, it would not be relieved of the ethical duty to take action against the federal judges involved, for their on-the-bench misconduct, and against New York's Attorney General, who polluted the judicial process, both in the district and circuit level, with litigation fraud. Failing to meet that duty would leave the Court without the moral authority to expect any other lawyer or judge to follow those ethical provisions, which lawyers and judges already find among the most difficult to follow.

As to the federal judges involved, there is no remedy within the federal judicial branch: the record shows that the Second Circuit has corrupted both judicial/appellate and §372(c) disciplinary remedies by dishonest decisions, following their failure to recuse themselves for bias. Therefore, referral must be made outside the federal judiciary: to the House Judiciary Committee and to the Justice Department's Public Integrity Section. Because both the 1993 Report of the National Commission on Judicial Discipline and Removal and the 1997 Report of the ABA's Commission on Separation of Powers and Judicial Independence obscure and fail to identify when judicial decisions may properly be the subject of disciplinary investigation and

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[11] According to the Report of the National Commission on Judicial Discipline and Removal, this Court uses the Code of Conduct for U.S. Judges for "guidance on applicable ethical standards..." at p. 122.

impeachment, such referral should identify that judges who render dishonest decisions -- which they *know* to be devoid of factual or legal basis -- are engaging in criminal and impeachable conduct.

As to New York's Attorney General, whose litigation fraud in the district court was the subject of petitioner's fully-documented and uncontroverted sanctions applications -- all unadjudicated -- and whose continued litigation fraud before the Circuit was the subject of her further fully-documented and uncontroverted sanctions applications -- denied by the Circuit, without reasons -- appropriate disciplinary and criminal referral must also be made. Otherwise, the public will continue to believe that New York's highest law enforcement officer, himself a defendant, is not restrained by the legal and ethical standards of conduct applicable to other lawyers [A-261].

POINT II

It is a Denial of Constitutional Due Process and Judicial Misconduct *Per Se* for a Court to Fail to Adjudicate, or to Deny Without Reasons, Fact-Specific, Documented Recusal Motions.

Over and again, this Court has held that "a fair trial in a fair tribunal is a basic requirement of due process", *In re Murchison*, 349 U.S. 133, at 136 (1955). In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986), the Court reiterated that "it certainly violates the Fourteenth Amendment...to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case". Justice Brennan reinforced this principle in his concurrence, stating that he did not interpret this to mean that only such interest would constitute a due process violation (at 829-830). The Court, in *Aetna*, further recognized that "in extreme cases" a judge's personal bias or prejudice can also violate constitutional due process rights (at 821). Assuredly, "pervasive bias", reaching the "impossibility of a fair trial" standard articulated by the Court's majority in *Liteky*, *supra*, presents such an "extreme" case.

Since this type of recusal motion, by its very nature, raises constitutional issues, a court cannot leave such motion unadjudicated, without compounding the potential constitutional violation. The inference reasonably drawn from a court's failure to rule on such due

process-determining motion is that it cannot meet the constitutional issues presented as to its bias. Likewise this is the inference where it denies the motion, without reasons.

Congress strengthened the self-executing judicial code provisions of disqualification by enacting 28 U.S.C. §455. The onus is not on the litigant to move for a judge's disqualification under warranted circumstances, but on the judge. Only as to §455(a) [A-3], providing for disqualification where a judge's "impartiality might reasonably be questioned", is there a provision for parties to waive the ground of disqualification -- and then only after full, on-the-record disclosure. It is *a fortiori* that where a recusal motion is made under the non-waivable §455(b) or what might be construed as subsumed within its ambit, the subject judge -- unless he grants the disqualification motion -- must respond with reasons that would be appropriate disclosure under §455(b), if waiver were permitted.

In *Liljiberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1987), the Court more than once stated: "The very purpose of §455 is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S.Rep. No. 93-419, at 5; H.R. rep. No. 93-1453, at 5." (at 865). Plainly, as to a motion made under §455(a), where a judge's impartiality might "reasonably be questioned", the very word "reasonable" contains within it the word "reason". Once a reasoned basis is given for a judge's recusal -- one persuasive to the "objective observer" -- the judge must provide reasons that would counter those proffered for "reasonably" questioning his impartiality. Doing otherwise makes a travesty of the statute designed to foster confidence in the judiciary.

At bar, petitioner made recusal applications at various stages of the litigation: against the district judge, the Chief Judge of the district, the Second Circuit, specific Second Circuit judges, and against the appellate panel. These applications, based not just on the appearance of bias, but its actuality, were fact-specific and documented. Yet, all were either ignored without adjudication or denied without reasons, except in the case of petitioner's order to show cause under §§144 and 455 for the recusal of the district judge, and her motion for reargument thereof, which the district judge denied for reasons whose falsity was demonstrated on appeal [A-148], but not adjudicated by the appellate panel's Summary Order [A-21]. Indeed, the Summary Order not only did not adjudicate whether, as

petitioner contended, those recusal applications met the *Liteky* standard [A-146], but did not adjudicate or even identify the sole overarching issue of the appeal [A-143], to wit, the district judge's "pervasive bias", even apart from his wrongful denial of the recusal order to show cause and reargument motion. At the same time, the appellate panel did not adjudicate or even identify petitioner's application for its own disqualification. To this perversion of petitioner's constitutional right to an unbiased tribunal, the Second Circuit gave its imprimatur by failing to request a vote on her *In Banc* suggestion [A-27], where, additionally, her Petition for Rehearing showed that the panel's Summary Order, no less than the district judge's decision, was totally devoid of factual or legal support [A-192]. The result was a further violation of petitioner's constitutional rights under the due process clause (*Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). In failing to grant *In Banc* review, the Circuit neither ruled on, nor identified, that its own disqualification was sought as part of that *In Banc* Petition [A-205], the basis for which was further particularized by petitioner's incorporated-by-reference recusal/Rule 60(b) vacatur for fraud motion. Such motion was separately denied, without reasons [A-33].

As this case shows, the Second Circuit's disregard for threshold disqualification issues is not confined to judicial/appellate contexts. It infects the §372(c) disciplinary mechanism at its highest echelon. Thus, the Chief Judge, whose absolute disqualification for bias and self-interest petitioner asserted in the §372(c) complaints themselves [A-251, A-247], dismissed them in an order [A-28] which failed to adjudicate or identify such issue as to himself or as to the Circuit, against which it was also asserted in the complaints. Likewise, the Second Circuit Judicial Council, which upheld the Chief Judge's dismissal [A-31], failed to identify, or adjudicate, such disqualification issues, focally reiterated in petitioner's Petition for Review [A-272-281] -- together with her showing that the dismissal of her §372(c) complaints was legally and factually insupportable and that she was entitled to disciplinary review of the bias of the district judge and of the appellate panel, as to which she had been unable to obtain rulings or rulings with reasons, *via* normal judicial/appellate channels [A-282-292]. This failure to address the disqualification issues was in the face of petitioner's explicit contention that:

> "where, as at bar, a recusal application is 'not frivolous or fanciful, but substantial and formidable', it is misconduct for judges to deny it *without any reasons or findings as to its sufficiency*. It is certainly misconduct *per se* for judges not to confront bias issues squarely before them for adjudication..." [A-258, A-277, emphasis in original].

It is inconceivable that any "objective observer" knowing these skeletal facts would have a shred of confidence in, let alone respect for, the federal judiciary. Certainly, were such "objective observer" to be given the full facts, including the opportunity to compare the complained-of court decisions with the record, he would waste no time in calling for disciplinary and criminal investigations -- and impeachment of the federal judges involved.

In *Liteky*, the Court viewed the bias allegations as so insubstantial that the majority disposed of them in two paragraphs. The minority agreed that was all that was required because they were "unimpressive" (at 1163). This case, by contrast, presents substantial bias allegations of all varieties: extrajudicial, intrajudicial, actual, and apparent, under §§144, 455, and the Fifth Amendment, in judicial, appellate, and disciplinary contexts -- on a record which is both perfectly protected and relatively compact. As such, it permits the Court to move away from the confusing theoretical abstracts of *Liteky*, which hardly provide a practical guide for the profession or the public, and to grapple with substantive facts to illuminate the meaning of its "impossibility of a fair trial" standard for intrajudicial bias, as well as the "appearance of impropriety" standard for extrajudicial bias. This, in addition, to exploring its own mistaken assumptions about judicial bias, particularly of the intrajudicial nature.

Here presented in one case is an unparalleled opportunity for the Court to address a range of recusal questions, with which it has never dealt -- and perhaps dodged. The "objective observer" might find it startling that, notwithstanding the critical and ever-recurring nature of judicial disqualification issues, some of the most basic procedural and adjudicative questions pertaining to both §§144 and 455, individually and in combination, have not been resolved by this Court. The result is an irreconcilable confusion within the Circuits

uniformly reflected by the treatises and law review articles[12]. Indeed, the uniformity achieved by this Court's failure to take cases involving §§144 and 455 is the consistent view by scholars that these vital statutes have been reduced to complete ineffectiveness by the strict interpretations imposed by the lower federal courts, contrary to normal rules of construction for remedial legislation:

"There is general agreement that §144 has not worked well." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3542, at 555, citing law review articles and quoting from *Statutory Disqualification of Federal Judges*, David C. Hjelmfelt, Kansas Law Review, Vol. 30: 255-263 (1982): "Section 144 has been construed strictly in favor of the judge...Strict construction of a remedial statute is a departure from the normal tenets of statutory construction."; Because of this strict construction, "disqualification under this statute has seldom been accomplished", initially and upon review, Flamm, *op. cit*, at 737, "...§144's disqualification mechanism has proven to be essentially ineffectual." Flamm, *ibid*, at 738; "While the text of sections 144 and 455 appear to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court refusal to recuse, is rarer still.", Charles Gardner Geyh, "*Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)*", Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, at 771 (1993).

CONCLUSION

This Petition for a Writ of Certiorari should be granted, with such other and further relief as this Court deems just and proper.

Doris L. Sassower

DORIS L. SASSOWER, Petitioner *Pro Se*

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[12] e.g.,"The uncertainty regarding how §§144 and 455 are supposed to interact has generated considerable confusion. For example, it has yet to be firmly resolved whether the procedural requirements set forth in §144 are also to be applied to motions made under §455.", Flamm, *op. cit*, at 741.

CONSTITUTIONAL, STATUTORY, COURT RULE AND ETHICAL CODE PROVISIONS

U.S. CONSTITUTION

Fifth Amendment:

No person shall be ... deprived of life, liberty, or property, without due process of law ...

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

42 U.S.C. §1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. §1985. Conspiracy to Interfere with Civil Rights

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any action in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

28 U.S.C. §144. Bias or Prejudice of Judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455. Disqualification of Justice, Judge, or Magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

...

(4) He knows that he ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He...

(i) is a party to the proceeding ...;

...

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

...

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

...

28 U.S.C. §372(c) Judicial Discipline

(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts... may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts

constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may --

(A) dismiss the complaint, if he finds it to be **(i)** not in conformity with paragraph (1) of this subsection, **(ii)** directly related to the merits of a decision or procedural ruling, or **(iii)** frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

...

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of

petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate....

28 U.S.C. §1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

FEDERAL RULES OF CIVIL PROCEDURE

F.R.Civ.P. Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature... They shall be construed to secure the just, speedy, and inexpensive determination of every action.

F.R.Civ.P. Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name; or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b)or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm

shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

...

F.R.Civ.P. Rule 12. Defenses and Objections -- When and How Presented -- By Pleading or Motion -- Motion for Judgment on the Pleadings

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon the defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state....

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading...shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

F.R.Civ.P. Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

...

(e) Forms of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent

to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

...

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

F.R.Civ.P. Rule 60. Relief from Judgment or Order

(b) ... Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of the judgment. ...

SECOND CIRCUIT RULES

Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers under 28 U.S.C. §372(c)

Rule 4

...

(b) Inquiry by Chief Judge. In determining what action to take, the chief judge, with such assistance as may be appropriate, may conduct a limited inquiry for the purpose of determining: (1) whether appropriate corrective action has been taken or can be taken without the necessity for a formal investigation, and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge or magistrate judge whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge, or magistrate judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any material matter that is reasonably in dispute.

(c) Dismissal. A complaint will be dismissed if the chief judge concludes --

> ... **(2)** that the complaint is directly related to the merits of a decision or procedural ruling;

RULES OF THE U.S. DISTRICT COURTS FOR THE SOUTHERN OF N.Y.:

Civil Rule 3(g)

Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for

denial of the motion.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

General Rule 4: Discipline of Attorneys

...

(d) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has been disciplined by any federal court or by the court of any state, territory, district, commonwealth or possession, the member may be disciplined by this court, in accordance with the provisions of paragraph g.

....

(g) Discipline imposed pursuant to paragraph (c), (d), (e), or (f) may consist of suspension or censure. In the case of an attorney who is a member of the bar of this court, it may also consist of striking the name of the attorney from the roll ...

Discipline may be imposed by this court with respect to paragraphs (d) and (e) unless the member of the bar concerned establishes by clear and convincing evidence: (1) with respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion of the other court; or (2) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or that the imposition of discipline of this court would result in grave injustice.

NEW YORK ATTORNEY DISCIPLINARY LAW

JUDICIARY LAW §90. ...removal from practice by appellate division

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice ...

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counselor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another....

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

...

6. Before an attorney or counselor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense.

...

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counselor-at-law under this section...shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of the state.

Supreme Court Disciplinary Rules: Second Judicial Department

22 N.Y.C.R.R. §691.4

Appointment of grievance committees; commencement of investigation of attorney misconduct; complaints; procedures.

(a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in ... the ninth judicial district at the time of their admission to practice by the Appellate Division;

...

(b) **(1)** Each grievance committee shall consist of 19 members and a chairman, all of whom shall be appointed by this court and 16 of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee.... This court shall, in consultation with the committees, appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

...

(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced *sua sponte* by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

...

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing, the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges

sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. Upon such filing, the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted a preference by this court.

(l) **(1)** An attorney who is the subject of an investigation, or of charges by a grievance committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 691.3(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or the attorney's failure to submit a written answer to a complaint of professional misconduct within 10 days of receipt of a demand for such an answer by the Grievance Committee, served either personally or by certified mail upon the attorney, or the attorney's failure to comply with any lawful demand of this court or the Grievance Committee made in connection with any investigation, hearing, or disciplinary proceeding, or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or

(iii) other uncontroverted evidence of professional misconduct.

(2) The suspension shall be made upon the application of the Grievance Committee to this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law. The court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the Committee have been concluded, and until further order of this court.

.

22 N.Y.C.C.R.R. §691.13 Proceedings where attorney is declared incompetent or alleged to be incapacitated.

(b)(1) ***Proceeding to determine alleged incapacity and suspension upon such determination***

Whenever a committee appointed pursuant to section 691.4(a) of this Part shall petition this court to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as this court shall designate. If, upon due consideration of the matter, this court is satisfied and concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending him on the ground of such disability for an indefinite period and until the further order of this court and any pending disciplinary proceedings against the attorney shall be held in abeyance.

ETHICAL AND PROFESSIONAL CODES OF CONDUCT

CODE OF CONDUCT FOR U.S. JUDGES

CANON 3: A Judge Should Perform the Duties of the Office Impartially and Diligently

...

B. Administrative Responsibilities

...

(3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

...

(5) A judge with supervisory authority over other judges should take reasonable measures to assure the timely and effective performance of their duties.

C. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

...

(c) the judge knows that ... the judge ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge ... **(iii)** is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

...

(3) For the purposes of this section:

...

(d) "proceeding" includes pretrial, trial, appellate

review, or other stages of litigation.

...

D. Remittal of Disqualification

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

ABA CODE OF JUDICIAL CONDUCT

CANON 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

...

C. Administrative Responsibilities

...

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

...

D. Disciplinary Responsibilities

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of his Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of

lawyer conduct have a different title] should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

...

(c) the judge knows that he or she has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimus interest that could be substantially affected by the proceeding;

(d) the judge ... **(iii)** is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

...

F. Remittal of Disqualification

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge,

all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

RULE 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

...

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or ~~in~~duce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial official officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Filed: U.S. Court of Appeals, Second Circuit: Sept. 10, 1997
Issued as Mandate: Dec. 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of September one thousand nine hundred and ninety-seven.

PRESENT: HON. THOMAS J. MESKILL,
HON. DENNIS JACOBS,

Circuit Judges,

HON. EDWARD R. KORMAN*,

District Judge.

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* Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

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DORIS L. SASSOWER,

Plaintiff-Appellant,

-against- Index #96-7805

GUY MANGANO, Hon., Presiding Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York, the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the Grievance Committee for the Ninth Judicial Circuit, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants-Appellees.

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[p. 2] APPEARING FOR APPELLANT:
DORIS L. SASSOWER, pro se, White Plains, NY

APPEARING FOR APPELLEES:
JAY T. WEINSTEIN, Assistant Attorney General of the State of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sprizzo, J.), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED.**

Pro se plaintiff Doris L. Sassower appeals from a May 24, 1996 judgment of the United States District Court for the Southern District of New York (Sprizzo, J.) that (i) denied her motions for summary judgment, a preliminary injunction, and reconsideration of a prior recusal motion; and (ii) granted summary judgment to defendants, who are several judges and officers of the State of New York. We affirm, substantially for the reasons stated in the district court's cogent Memorandum Opinion and Order, Sassower v. Mangano, 927 F. Supp. 113 (S.D.N.Y. 1996).

The complex facts and procedural history of this case are set forth in detail in the district court's opinion, see id., at 115-18, and are recounted here only in brief. Sassower was a member in good standing of the New York bar in October 1990, when she was ordered by a state bar regional grievance committee -- pursuant to a pending disciplinary proceeding against her related to fee disputes -- to undergo a medical examination to determine her mental fitness to practice law. Id. at 115-16. Sassower refused to comply with that order, and in June 1991 her license to practice law in the State was suspended; two supplemental disciplinary petitions were subsequently filed against her as well. Id. at 116. Over the course of the next several years, Sassower filed numerous appeals, motions, and independent actions challenging the suspension of her license, including, inter alia, a direct appeal of the suspension order to the New York State Court of Appeals, a proceeding under Article 78, N.Y. C.P.L.R. §§7801 et seq., and a petition for a writ of certiorari to the United States Supreme Court, pursuant to 28 U.S.C. §1257(a). All of Sassower's actions, petitions, and motions (including motions for reargument) have been denied or dismissed. Sassower, 927 F. Supp. at 116-18.

[p. 3] In June 1994, Sassower filed the present action under various federal statutes, including 42 U.S.C. §1983, alleging that the relevant New York attorney disciplinary regulations were unconstitutional, both facially and as applied, that the defendants had violated her constitutional rights by suspending her license to practice law, and that the defendants had intentionally inflicted emotional distress upon her (in violation of state law). Id. at 118. She sought declaratory relief, dismissal of the disciplinary and suspension orders, reinstatement of her license, compensatory and punitive damages, and costs and attorney's fees. Id.

The defendants moved under Fed. R. Civ. P. 12(c) for a judgment on the pleadings, arguing that the district court lacked subject matter jurisdiction, and that Sassower's claims were barred by res judicata, absolute immunity, and the Eleventh Amendment. Id. at 115. Sassower cross-moved for a preliminary injunction and for summary judgment, and moved for reconsideration of the court's prior ruling refusing to recuse itself from the case. Id. at 115, 118. The district court treated the defendants' motion for judgment on the pleadings as one for summary judgment (because of the extensive affidavits filed by the parties), and granted the motion, dismissing Sassower's complaint on the grounds that: (i) the court lacked subject matter jurisdiction under the Rooker-Feldman doctrine; (ii) Sassower's constitutional claims were barred by res judicata; (iii) her claims against both the judicial and non-judicial defendants in their individual capacities were barred by absolute immunity; and (iv) her claims for damages against the defendants in their official capacities were barred by the Eleventh Amendment. Id. at 118-121. Sassower's motions were likewise denied. Id. at 121.

We agree with the district court that it lacks subject matter jurisdiction under Rooker-Feldman, and affirm the dismissal of Sassower's complaint on that ground; we therefore do not address the district court's other rulings.

The Rooker-Feldman doctrine "generally stated, is that inferior federal courts have no subject matter jurisdiction over cases that effectively seek review of judgments of state courts and that federal review, if any, can occur only by way of a certiorari petition to the Supreme Court." Moccio v. New York State Office of Court Admin., 95 F.3d 195, 197 (2d Cir. 1996) (emphasis added). See Rooker v. Fidelity Trust Co., 263 U.S. 413, 414-16 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476-79, 482-85 (1983). Like any challenge to subject matter jurisdiction, a challenge under Rooker-Feldman "may be raised at any time by either party or sua sponte by the court." Moccio, 95 F.3d at 198; see also Gilman v. BHC Secs., Inc., 104 F.3d 1418, 1421 (2d Cir. 1997). "We review de novo the district court's determination that, as a matter of law, **[p. 4]** jurisdiction did not exist." Moccio, 95 F.3d 198.

The district court recited the axiom that Rooker-Feldman "bars not only claims which would involve direct review of a state

court decision, but also claims which are 'inextricably intertwined' with a state court decision or which seek relief that, if granted, would modify a state court decision." Sassower, 927 F.Supp. at 119 (citing Feldman, 460 U.S. at 483 n. 16; Rooker, 263 U.S. at 416). The court concluded that Sassower had raised all of her present claims in previous state proceedings, and that "[b]ecause all of the relief requested...would necessarily involve direct, or at a minimum indirect, review of the propriety of those state court decisions, Sassower's claims must be dismissed." Id.

On appeal, Sassower argues that her complaint does raise claims -- such as her facial challenge to the constitutionality of New York's attorney disciplinary regulations -- that either were not raised in her various state-court actions, motions, and appeals, or "do[] not require review of any state court decisions." Appellant's Brief at 71. She furthermore points for support to our statement in Moccio that "[s]ince Feldman, the Supreme Court has provided us with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not." Moccio, 95 F.3d at 198.

At the outset, we disagree with Sassower's contentions of fact: we think that all of her present claims were raised in one form or another in the prior proceedings[1], and that she now is "effectively seek[ing] review of judgments of [the]state courts," Moccio, 95 F.3d at 197, judgments that have deprived her of her license to practice law, and with which she is (understandably) displeased. In any event, we conclude that Sassower's claims are barred under Rooker-Feldman because she undoubtedly could have raised them in the state-court proceedings. Notwithstanding the "inconsistency" that the Moccio court noted among cases addressing Rooker-Feldman challenges, id. at 198, this Court concluded in Moccio that

> the Supreme Court's use of "inextricably intertwined" means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding...,

---

[1] For example, Sassower's petition for certiorari to the Supreme Court specifically challenged the constitutionality of New York's attorney regulations both facially and as applied. See Sassower, 927 F. Supp. 117-18.

> subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles of [claim or issue] preclusion. . . . Accordingly, we decide **[p. 5]** whether the Rooker-Feldman doctrine applies to [the plaintiff's] claims by turning to preclusion principles.

Moccio, 95 F.3d at 199-200.

Examining Sassower's complaint under contemporary preclusion principles, it is manifest that her present claims -- as the district court determined -- were effectively "raised and denied in the state proceedings," and consequently, "are inextricably intertwined with her particular case." Sassower, 927 F. Supp. at 119-120. In these circumstances, the district court was without subject matter jurisdiction to hear Sassower's claims under Rooker-Feldman, and the court's dismissal of her complaint on that ground was therefore required.

s/
Hon. Thomas J. Meskill

s/
Hon. Dennis Jacobs

s/
Hon. Edward R. Korman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Dec. 17, 1997]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of December one thousand nine hundred and ninety-seven.

Sassower
v
Mangano

Dkt No: 96-7805

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Doris L. Sassower.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
SECOND

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In re 97-8535, -8539,
-8540, -8541

CHARGE OF JUDICIAL MISCONDUCT

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RALPH K. WINTER, Chief Judge:

On October 29 and November 28, 1997, Complainant filed four complaints with the Clerk's Office pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act, 28 U.S.C. §372(c) (the Act), and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (the Local Rules), charging Judges of this Circuit with misconduct. The subject of complaint 97-8535 is a District Court Judge (Judge A); the subjects of complaints 97-8539, 97-8540, and 97-8541, are two Circuit Court Judges (Judges B and C) and a District Court Judge (Judge D), who were members of an appellate panel.

Background:

Complainant's license to practice law was suspended in 1991. In 1994, following unsuccessful court challenges to the suspension, Complainant filed a federal lawsuit pursuant to 42 U.S.C. §1983 charging state court judges, disciplinary committee members, and others with civil rights violations. Complainant also asserted a state law claim for intentional infliction of emotional **[p. 2]** distress. In May 1996, Judge A granted summary judgment dismissing the federal claims and declined to exercise jurisdiction over the state law claim. That ruling was affirmed in September 1997 by a panel, comprised of Judges B, C, and D, of the Court of Appeals for the Second Circuit.

Allegations:

With respect to the district court proceedings, Complainant accuses Judge A of issuing a "knowingly false, fabricated, and

fraudulent decision of dismissal" and "wilfully fail[ing] to adjudicate" her applications for sanctions. The complaint also accuses Judge A of "pervasive bias" and "flagrant dishonesty" in denying Complainant's recusal motion and her motion to reargue the dismissal. The complaint further contends that Judge A violated canons of judicial ethics by failing "to take corrective steps in the face of misconduct" by the judges and attorneys who are the defendants in Complainant's federal lawsuit.

In the misconduct charges against the appellate panel, Judges B, C, and D, Complainant seeks to incorporate by reference hundreds of pages of material from the underlying suit. The complaints themselves, after reiterating the allegations against Judge A and the charges against state judges and others, accuse the panel members of bias. They assert that Judge C "cut [Complainant] off, mid-sentence" at oral argument, and contend that the panel issued a "knowingly false and fraudulent not-for-publication, no-**[p.3]** citation Summary Order" in order to retaliate for the "judicial whistle-blowing advocacy" of Complainant and others in her family. The complaints also allege violations of canons of judicial ethics by Judges B, C, and D because of their failure to take action against the judicial officers named as defendants in the underlying suit.

Disposition:

The allegations of misconduct in these complaint are rooted in judicial rulings. Apart from one assertion that Judge C cut off Complainant at oral argument -- an act that is often required to curtail loquacity and that, without more, does not constitute judicial misconduct -- the alleged infirmities of the rulings are the only "evidence" cited in support of the sweeping charges. Fundamentally, Complainant's argument is that Judge A's rulings, and the affirmance by Judges B, C, and D, were so egregiously wrong that they could only have resulted from bias and deliberate wrongdoing.

Complainant, an experienced litigant, knows that the Act is not a mechanism for reviewing the merits of judicial determinations. She argues, however, that these complaints do not seek a merits review because the Judges did not address the "merits". As complainant puts it, the alleged misconduct, "although arising from a litigation and encompassing a judicial decision and rulings, is **[p. 4]**

not 'merits-related' because no adjudications were rendered 'on the merits'."

That position does not withstand scrutiny. Although Complainant contends that the outcomes are indefensible, there is no question that the rulings of Judge A, together with the affirmance by Judges B, C, and D, represent decisions about the merits of Complainant's lawsuit. Moreover, all of the alleged misconduct -- including the claims that facts were intentionally omitted and misrepresented and that the Judges did not comply with canons of judicial ethics -- is intertwined with the substance of those rulings. What Complainant seeks, but what the Act does not provide, is a review of the merits of those decisions. The 'compelling policy' underlying the 'statutory directive for dismissal of complaints of judicial misconduct which in substance are simply objections to substantive or procedural error," In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Coun. 1982), is applicable here:

> "To determine whether a judge's rulings were so legally indefensible as to mandate intervention would require the same type of legal analysis as is afforded on appeal. More important, the gravamen of the complaint is not the fitness of the judge, but the merit of his decision. Disciplinary procedures must not be used to correct judicial mistakes."

Id.; see also Green v. Seymour, 59 F.3d 1073, 1077-78 (10th Cir. 1995). The complaints are dismissed as directly related to the merits, pursuant to 28 U.S.C. §372(c)(3)(A)(ii) and Rule 4(c)(2) of the Local Rules.

[p. 5] The Clerk is directed to transmit copies of this order to Complainant and to the Judges.

s/
RALPH K. WINTER
Chief Judge

Signed: New York, New York
February 9, 1998
FILED: FEB 9 1998

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

In Re:	No. 97-8535
	97-8539
CHARGE OF JUDICIAL MISCONDUCT	97-8540
---	97-8541

Before the Judicial Council of the Second Circuit:

A complaint having been filed on October 29, 1997, and three complaints having been filed on November 28, 1997, alleging misconduct on the part of Circuit and District Court Judges of this Circuit, and the complaints having been dismissed on February 9, 1998 by the chief judge of the Circuit, and a petition for review having been filed timely on March 25, 1998,

Upon consideration thereof by the Council it is

ORDERED that the petition for review is DENIED for the reasons stated in the order dated February 9, 1998.

The clerk is directed to transmit copies of this order to the complainant and to the Circuit and District Court Judges whose conduct is the subject of the underlying complaints.

s/
George Lange III
Circuit Executive
by Direction of the
Judicial Council

Dated: New York, New York
May 4, 1998

[*Petitioner's note: members of Second Circuit "Judicial Misconduct Complaints Petition for Review Panel" from 5/1/98-8/31/98: Amalya Kearse, CJ; Pierre Leval, CJ, Charles Sifton, USDC-EDNY; J. Garvan Murtha,* USDC-WDNY*]*

SECOND CIRCUIT'S SUMMARY DISPOSITION OF PETITIONER'S RECUSAL/SANCTIONS MOTION, filed April 1, 1997 in the Second Circuit Court *of Appeals*

T1080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Sassower v. Mangano, et al. — 96-7805
NOTICE OF MOTION
for "*substantive relief*"
(handwritten by Petitioner)

...

Brief statement of the relief requested: [handwritten by Petitioner]

> "*Motion for consideration by a judge outside the Circuit; sua sponte recusal of the Circuit; vacatur of orders granting motions of Appellees' counsel for pro hac vice relief and extension of time and filing of corrected Briefs; dismissal/denial of said motions; show cause order; sanctions, including contempt and other relief*"
>
> s/ Doris L. Sassower, Appellant *Pro Se*
> 4/1/97

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/ Amalya Kearse, U.S.C.J.
s/ Guido Calabresi, U.S.C.J
s/ Louis Oberdorfer, U.S.D.J.

Date: 4/29/97

FILED: APR. 29 1997

SECOND CIRCUIT'S SUMMARY DISPOSITION OF PETITIONER'S RECUSAL/RULE 60(b) VACATUR FOR *FRAUDMOTION*, filed October 10, 1997 in the Second Circuit Court of Appeals

T1080
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Sassower v. Mangano, et al. — 96-7805

NOTICE OF MOTION
for *Recusal/Transfer, Vacatur, Sanctions*
[handwritten by Petitioner]

...

Brief statement of the relief requested: [handwritten by Petitioner]

> "*Recusal of the Circuit and particularly the 3-judge panel which heard and adjudicated the appeal by Summary Order and Decision filed September 10, 1997, to be read in conjunction with my Petition for Rehearing with Suggestion for Rehearing in Banc*"

s/ Doris L. Sassower,
Plaintiff-Appellant *Pro Se*
10/10/97

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

FOR THE COURT:
George Lange III, Clerk
by: s/
Beth Meador
Administrative Attorney

Date: 10/22/97
FILED: OCT. 22 1997

JUDGMENT OF THE DISTRICT COURT

[Filed May 24, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DORIS L. SASSOWER,

Plaintiff,

94 CIVIL 4514 (JES)

-against-

Hon. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants.

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Defendants having moved pursuant to Federal Rule of Civil Procedure 12(c), for judgment on the pleadings, and Plaintiff having cross-moved pursuant to Rules 12(c), 12(d), and 56(c), for a preliminary injunction and for summary judgment, and the said motions having come before the Honorable John E. Sprizzo, United States District Judge, and the Court thereafter on May 21, 1996, having rendered its Memorandum Opinion (76657) and Order, granting the defendants' motion for summary judgment and denying Plaintiff's cross-motions for a preliminary injunction, summary judgment, and reconsideration, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion for summary judgment is granted; plaintiff's cross-motions for a preliminary injunction, summary judgment, and reconsideration are denied, and judgment is hereby entered in favor of defendants dismissing the Complaint.

DATED: New York, New York
May 24, 1996

JAMES M. PARKISON

Clerk of Court

BY: s/
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET
ON 5-29-96

MEMORANDUM OPINION AND ORDER OF THE DISTRICT JUDGE

[R-4] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DORIS L. SASSOWER,

Plaintiff,

94 Civ. 4514 (JES)

-against-

MEMORANDUM OPINION AND ORDER

Hon. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants.

----------x

SPRIZZO, D.J.:

Pursuant to 42 U.S.C. §1983, plaintiff Doris L. Sassower, appearing pro se, brings the instant action against defendants Honorable Guy Mangano, Gary Casella, Edward Sumber, Max Galfunt, former New York State Attorney General G. Oliver Koppell, and the Grievance Committee for the Ninth Judicial District and its members (collectively 'defendants') arising out of state disciplinary proceedings which resulted in the suspension of her license to practice law. Sassower claims, inter alia, that defendants deprived her of her right to due process by conspiring to suspend her license

to practice law without granting a hearing thereon. Pursuant to Federal Rules of Civil Procedure 12(c), defendants move **[R-5]** for judgment on the pleadings on the grounds that the Court lacks subject matter jurisdiction and Sassower's claims are barred by res judicata, absolute immunity, and the Eleventh Amendment. Pursuant to Federal Rules of Civil Procedure 12(c), 12(d), and 56(c), Sassower cross-moves for a preliminary injunction and for summary judgment.

BACKGROUND

Pursuant to Judiciary Law §90(2), defendant Appellate Division, Second Department of the Supreme Court of the State of New York (the "Second Department") is authorized to discipline members of the New York State bar within the Second Department. Complaint ("Compl") ¶19. At all relevant times, defendant Honorable Guy Mangano served as the presiding justice of the Second Department. Id. ¶19. Pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, §691.4(a), the Second Department appointed defendant Grievance Committee for the Ninth Judicial District (the "Grievance Committee") to investigate and prosecute matters involving attorney misconduct in the Ninth Judicial District. Id. ¶¶20, 21. Defendants Gary Casella and Edward Sumber serve as Chief Counsel and Chairman, respectively, of the Grievance Committee. Id. ¶¶21,22. Defendant Max Galfunt is a special referee appointed by the Second Department to hear disciplinary matters prosecuted by the Grievance Committee. Id. ¶23. At all relevant times, defendant G. Oliver Koppell was the Attorney General of the State of New York. Id. ¶24.

Pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, §691.4(c), **[R-6]** the Grievance Committee may commence an investigation of professional misconduct against an attorney sua sponte or upon receipt of a complaint by the Second Department or by any other such committee. See N.Y. Comp. Codes R. & Regs. tit. 22, §691.4(c). After a preliminary investigation and upon a majority vote of its full membership, the Grievance Committee may 1) dismiss the complaint, 2) conclude the matter by issuing a letter of caution to the attorney, 3) conclude the matter by privately admonishing the attorney, 4) serve written charges upon the attorney and hold a hearing on the matter, or 5) recommend to the Second Department

that disciplinary proceedings be instituted. See N.Y. Comp. Codes R. & Regs. tit. 22, §691.4(e).

In 1955, plaintiff Doris L. Sassower was admitted to the bar of the State of New York. In 1987 and 1988, two former clients of Sassower filed complaints with the Grievance Committee against her relating to fee disputes. Compl. ¶42. On July 31, 1989, the Grievance Committee filed a report with the Second Department in relation thereto. ¶¶41, 42. On December 14, 1989, the Second Department authorized the prosecution of a disciplinary proceeding against Sassower. Id. ¶55. On February 6, 1990, the Grievance Committee issued a disciplinary petition against Sassower (the 'February 1990 petition'). Id. ¶59. On February 8, 1990, Sassower was served with notice of the February 1990 petition. Id.

On May 8, 1990, pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, §691.13(b)(1), the Grievance Committee filed an order to show cause with the Second Department seeking a court-ordered medical **[R-7]** examination of Sassower to determine whether she was mentally incapable of practicing law. Compl. ¶66. On October 18, 1990, the Second Department granted the motion directing Sassower to be examined by a qualified medical expert. Id. ¶93. Sassower refused to comply with the October 18, 1990 order. Id.

On January 25, 1991, the Grievance Committee filed an order to show cause with the Second Department seeking the immediate suspension of Sassower's license to practice law for her failure to comply with the October 18, 1990 order. Compl. ¶¶85, 93. By order dated June 14, 1991, pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, §691.13(b)(1), the Second Department granted the Grievance Committee's petition, thereby suspending Sassower's license to practice law pending her compliance with the October 18, 1990 order (the "June 1991 suspension order"). Id. Thereafter, Sassower moved by order to show cause for vacatur or modification of the Second Department's June 1991 suspension order and for a temporary restraining order on the ground that the suspension of her license was 'unauthorized and excessive punishment for her attorney's legitimate legal challenge to [the] October 18, 1990 Order." Id. ¶¶97, 98. On July 15, 1991, the Second Department denied Sassower's motion. Id. ¶98.

By motion dated July 19, 1991, Sassower moved for leave to appeal, inter alia, from the June 1991 suspension order to the New

York State Court of Appeals (the "Court of Appeals") on the grounds that the Second Department had failed to comply with the requirements of N.Y. Comp. Codes R. & Regs. tit. 22, §691.4 and **[R-8]** related case law, thereby depriving her of her constitutional right to due process. Compl. ¶107. On September 10, 1991, the Court of Appeals denied Sassower's motion for leave to appeal. Id. ¶117.

On April 9, 1992, the Grievance Committee issued sua sponte a supplemental petition against Sassower alleging professional misconduct in two previous cases (the "April 1992 supplemental petition"). Compl. ¶127.

On June 16, 1992, Sassower again moved to vacate the June 1991 suspension order on the ground that a recent decision, In re Russakoff, 79 N.Y.2d 520 (1992), required that the Second Department hold a post-suspension hearing and make factual findings on the record. Compl. ¶134. By motion dated June 18, 1992, Sassower moved the Second Department to dismiss the April 1992 supplemental petition, as well as the February 1990 petition, on the ground that both failed to comply with the provisions of Judiciary Law §90 and N.Y. Comp. Codes R. & Regs. tit. 22, §§691.4(e)(4), (f), and (h). Id. ¶135. On July 31, 1992, the Second Department denied Sassower's motion to vacate the June 1991 suspension order and all other relief requested by Sassower. Id. ¶143.

Thereafter, Sassower moved to appeal as of right to the Court of Appeals the June 1991 suspension order on the ground that her constitutional right to equal protection had been denied. Compl. ¶144. By order dated November 18, 1992, the Court of Appeals dismissed Sassower's appeal for lack of finality. Id. ¶145.

On January 28, 1993, the Grievance Committee issued a second **[R-9]** disciplinary petition against Sassower arising from five charges filed sua sponte by the Grievance Committee (the "January 1993 petition"). Compl. ¶¶151, 153. Between January 28, 1993 and February 22, 1993, Sassower was served with notice of the January 1993 petition. Id. ¶155. On February 22, 1993, Sassower moved to vacate the January 1993 petition for lack of personal jurisdiction. Id. ¶156.

On March 25, 1993, the Grievance Committee issued a third disciplinary petition against Sassower based on additional allegations of professional misconduct (the "March 1993 petition"). Compl.

¶162. On March 30, 1993, Sassower was served with the petition.[1] Id. ¶162. On April 14, 1993, Sassower moved to vacate the March 1993 petition for lack of personal jurisdiction because of improper service of process. Id. ¶¶164, 172.

On April 28, 1993, Sassower instituted an Article 78 proceeding against Honorable Guy Mangano, as presiding justice of the Appellate Division, Second Department, Max Galfunt, as Special Referee assigned to hear disciplinary petitions, and Edward Sumber and Gary Casella, as Chairman and Chief Counsel, respectively, of the Grievance Committee for the Ninth Judicial District. Compl. ¶166. In that action, Sassower claimed that the defendants failed to comply with jurisdictional pre-petition procedures under N.Y. Comp. Codes R. & Regs. tit. 22, §691.4(e) and (f). Id.

[R-10] On May 24, 1993, while the Article 78 petition was pending, the Second Department denied Sassower's motions to vacate the January 1993 and March 1993 petitions. Compl. ¶171. On June 14, 1993, Sassower moved to reargue/renew the Second Department's May 24, 1993 order. Id. ¶172.

In the Article 78 proceeding, defendants moved to dismiss on the grounds of failure to state a claim and the statute of limitations. See Sassower's Petition for a Writ of Certiorari filed as Sassower Exh. 2A ("Cert. Pet'n.") at A-20. On July 2, 1993, Sassower cross-moved to amend her Article 78 petition to plead an alleged "pattern of abusive and harassing conduct" by the defendants. Compl. ¶173. By order dated September 20, 1993, the Second Department denied Sassower's June 14, 1993 reargument/renewal motion, granted the defendants' motion to dismiss the Article 78 petition "on the merits," and denied Sassower's relief requested in her cross-motion. Id. ¶¶182, 183, 185; Cert. Pet'n. at A-21.

On November 19, 1993, Sassower moved the Second Department for, inter alia, dismissal of the February 1990, January 1993, and March 1993 disciplinary petitions. Compl. ¶189. In addition, Sassower sought transfer to another judicial department on the ground that the Second Department knew that the disciplinary

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[1] Sassower claims herein that the Grievance Committee failed to personally serve her with notice of the January 1993 and March 1993 petitions, as required by Judiciary law §90(6). Compl. ¶¶155, 162.

proceedings against her were somehow "void." Id. ¶190. On January 24, 1993, Sassower appealed the Second Department's dismissal of her Article 78 petition and denial of her cross-motion on the grounds that 1) the Second Department acted in a fraudulent and **[R-11]** criminal manner, 2) the Second Department improperly reviewed its own conduct in an Article 78 proceeding against it, and 3) the "open-ended" interim suspension orders and the disciplinary mechanism" violated her rights to due process, equal protection and free speech. Id. ¶198; Cert. Pet'n. at A-93 to A-94.

By order dated January 28, 1994, the Second Department denied Sassower's November 19, 1993 dismissal/transfer motion. Compl. ¶201. By decision dated May 12, 1994, the Court of Appeals dismissed Sassower's appeal taken from the Second Department's dismissal of the Article 78 proceeding and denial of her cross-motion on the grounds that her appeal 1) lacked finality and 2) did not directly involve a substantial constitutional question. Id. ¶209. On September 29, 1994, the Court of Appeals denied Sassower's motion to reargue its May 12, 1994 order. See Cert Pet'n. at A-23.

In October 1994, pursuant to 28 U.S.C. §1257(a), Sassower filed a petition in the United States Supreme Court for certiorari to review the June 1991 suspension order, which had become final when the New York Court of Appeals denied leave to appeal.[2] See Cert. Pet'n. at 1. Sassower sought a writ of certiorari on the grounds that 1) N.Y. Comp. Codes R. & Regs. tit. 22 §691.4 is unconstitutional on its face and as applied, 2) New York Judiciary Law §90 is unconstitutional in failing to provide for a post-suspension hearing, and 3) the Second Department applied the **[R-12]** statutory disciplinary provisions in an unconstitutional manner. See id. at 16-25. In her petition for certiorari, Sassower further states that "the constitutional issues were raised in the Appellate Division, Second Department, the originating court in this proceeding." Id. at A-89, n. 1. On May 15, 1995, the Supreme Court denied Sassower's petition for a writ of certiorari. See Sassower v. Mangano, 115 S.Ct. 1961

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[2] In her petition for a writ of certiorari, Sassower appears to appeal from the New York Court of Appeals decisions denying leave to appeal directly the June 1991 suspension order and also the dismissal of the Article 78 proceeding.

(1995).

On June 20, 1994, Sassower filed the instant action, claiming that 1) N.Y. Comp. Codes R. & Regs. tit. 22 §§691.4(l)(1) and 691.2 are unconstitutional on their faces and as applied, Compl. ¶¶210, 211, 2) defendants acted under color of state law to "wilfully and maliciously" violate her constitutional rights by, inter alia, conspiring to deprive her of her license to practice law, id. ¶¶236, 247, and 3) defendants intentionally inflicted emotional distress upon her, id. ¶251. Sassower seeks, inter alia, declaratory judgment, dismissal of the June 1991 suspension order, reinstatement of her license to practice law, compensatory and punitive damages, attorney's fees and costs. Id. ¶251. On September 28, 1995, the Court issued a decision on the Record denying Sassower's application for a temporary restraining order on the ground that Sassower had failed to establish the need for emergency relief. See transcript dated September 28, 1995 at 25.

Pursuant to Federal Rules of Civil Procedure 12(c), defendants move for judgment on the pleadings.[3] Pursuant to Federal Rule **[R-13]** of Civil Procedure 41(b), defendants also moved to dismiss on the ground that Sassower failed to comply with this Court's November 4, 1995 order directing her to file with this Court copies of all documents filed in the New York State court proceedings relating to the claims raised herein. Pursuant to Federal Rules of Civil Procedure 12(c), (d), and 56(c), Sassower cross-moves for a preliminary injunction and for summary judgment.[4] In addition,

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[3] Because both parties filed voluminous affidavits relating to defendants' motion, the Court treats defendants' motion for judgment on the pleadings as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(c). See, e.g., Hanson v. McCaw Cellular Communic., 77 F.3d 663 (2d Cir. 1996).

[4] At one point in these proceedings, Sassower asserted that she had not cross-moved for summary judgment. See Transcript dated September 28, 1995 ("Sept. 28, 1995 Tr.") at 31-33. However, on June 26, 1995, Sassower filed a "Memorandum Of Law In Opposition To Defendants' Motion For Dismissal On The Pleadings And In Support Of Summary Judgment And Sanctions In The Plaintiff's Favor" accompanied by a Statement Pursuant to Local Rule 3(g), which is relevant only to a motion for summary judgment.

Sassower moves for reconsideration of the denial of her motion for recusal of this Court. See Transcript dated October 27, 1995 at 6-8.

DISCUSSION

On October 26, 1995, one day prior to oral argument on all outstanding motions, Sassower filed a motion for recusal pursuant to 28 U.S.C. §144 on the ground that the Court held a personal **[R-14]** bias against her. At oral argument on October 27, 1995 the Court denied Sassower's motion both as untimely and as lacking in merit because it alleged at best a dissatisfaction with the Court's rulings. On March 8, 1996, Sassower filed a motion for reconsideration of her recusal motion on the ground that the "court's conduct has been maliciously calculated to injure" her. That motion was based upon an assertion that the Court imposed upon her a short deadline to file her motions. However, since the Court also imposed the same deadline upon the defendants, Sassower's renewed recusal motion likewise must be denied. See United States v. Brinkworth, 68 F.3d 633, 639 (2d Cir. 1995) (affirming denial of recusal motion filed soon after adverse rulings and eight days prior to trial); see also Apple v. Jewish Hosp. and Medical Ctr.,829 F.2d 326, 333 (2d Cir. 1987) (prompt application of recusal motion required to avoid risk that moving party delay his application until after adverse ruling).

Turning to the merits of the claims asserted in this action, it is clear that Sassower's claims must be dismissed because the Court lacks subject matter jurisdiction to resolve them. It is well established that a federal district court is one of original, and not appellate, jurisdiction and therefore has no subject matter jurisdiction to review state court decisions. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Atlantic Coast Line R.R. v.

In Sassower's affidavit in support of her cross-motion, she explicitly requests "that a summary judgment in Plaintiff's favor as to liability be granted." See Affidavit of Doris L. Sassower Sworn to June 23, 1995 32. Moreover, at oral argument, Sassower stated, "I submitted my summary judgment papers June 23 [1995]." Sept. 28, 1995 Tr. at 20. Thereafter, Sassower argued that her motion papers do not seek summary judgment. However, because Sassower concedes that her motion seeks affirmatively relief on the merits, the Court construes her motion as one for summary judgment.

Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970); Rooker v. Fidelity Trust, 263 U.S. 413, 415-416 (1923). Therefore, an aggrieved state court litigant must **[R-15]** pursue his claims directly in the state appellate courts and ultimately to the United States Supreme Court. See Feldman, 460 U.S. at 476; Rooker, 263 U.S. at 415; Tang v. Appellate Division, 487 F.2d 138, 141 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974).

Moreover, the Rooker-Feldman doctrine bars not only claims which would involve direct review of a state court decision, but also claims which are "inextricably intertwined" with a state court decision or which seek relief that, if granted, would modify a state court decision. See Feldman, 460 U.S. at 483, n. 16; Rooker, 263 U.S. at 416.

Here, Sassower challenged the June 1991 suspension order directly in the Second Department and collaterally in the Article 78 proceeding. Thereafter, Sassower pressed both her statutory and constitutional challenges to the June 1991 suspension order and to the New York State bar disciplinary rules upon which they were issued, in the state appellate courts and ultimately in the Supreme Court. Indeed, Sassower raised all of the claims asserted herein in the state court and in her petition for a writ of certiorari, including claims that N.Y. Comp. Codes R. & Regs. tit. 22, §691.4 is unconstitutional on its face and as applied, and that New York Judiciary Law §90 is unconstitutional in failing to provide for a post-suspension hearing. See Cert. Pet'n. at 16-25, A-89 n.1. Because all of the relief requested herein would necessarily involved direct, or at a minimum indirect, review of the propriety of those state court decisions, Sassower's claims must be **[R-16]** dismissed. See Rooker, 263 U.S. at 415-16; Feldman, 460 U.S. at 482; Campbell v. Greisberger, No. 1171, 1996 WL 156041 at *4-5 (2d Cir. Mar. 28, 1996).

In Feldman, the plaintiffs, unsuccessful applicants to the District of Columbia Bar, brought actions in federal district court claiming that the state court had violated their federal statutory and constitutional rights by denying their petitions for waivers of state bar provisions. The Supreme Court distinguished between the two types of claims raised in Feldman: "[t]he first [being] a constitutional challenge to the state's general rules and regulations governing admission; the second [being] a claim, based on constitutional or

other grounds, that the state has unlawfully denied a particular applicant admission." Feldman, 460 U.S. at 485 (citations omitted). The Supreme Court held that a federal district court has no subject matter jurisdiction to adjudicate the latter type of claim, which may be challenged only in the Supreme Court. See id. at 475. However, district courts "have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case. They do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." Id. at 486.

Because in the instant case all of the claims asserted here, including the general challenges to the constitutionality of the **[R-17]** statutory scheme, were raised and denied in the state proceedings, see Cert. Pet'n. at A-20 to A-87, A-89 n.1, Sassower's constitutional challenge to the state bar disciplinary rules are inextricably intertwined with her particular case.[5] See Feldman 460 U.S. at 475.

In any event, Sassower's constitutional claims are barred by res judicata. The doctrine of res judicata bars subsequent litigation of claims which were raised or could have been raised in a prior proceeding involving the same parties or their privies, which resulted in a judgment on the merits by a court of competent jurisdiction. See Liona Corp. v. PCH Assocs., 949 F.2d 585, 594 (2d Cir. 1991); see also Winters v. Lavine, 574 F.2d 46, 57 (2d Cir. 1978). Because all of Sassower's claims were repeatedly raised and rejected in state court proceedings, they are barred from being relitigated in the instant action. See Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974).

Sassower challenged the constitutionality of the June 1991 suspension order and the relevant statutory disciplinary provisions in

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[5] Although it is unclear whether Sassower directly challenged N.Y. Comp. Codes R. & Regs. tit. 22, §691.2 in the state court proceedings, Sassower vigorously litigated her challenge to, inter alia, N.Y. Comp. Codes R. & Regs. tit. 22, §691.4 and the related "disciplinary mechanism," which would encompass the provisions of §691.1.2. Compl. ¶198; Cert. Pet'n at A-93 to A-94.

the state trial and appellate courts as well as in the United States Supreme Court. Moreover, for the purposes of res judicata, the dismissal of Sassower's January 24, 1993 appeal as of right by **[R-18]** the Court of Appeals on the ground that no substantial constitutional question was involved, was a final adjudication on the merits. See Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 521 (2d Cir.), cert. denied, 434 U.S. 834 (1977); McCune v. Frank, 521 F.2d 1152, 1155 (2d Cir. 1975); Olitt v. Murphy, 453 F. Supp. 354, 359 (S.D.N.Y.), aff'd, 591 F.2d 1331 (2d Cir. 1978), cert. denied, 444 U.S. 825 (1979).

In addition, Sassower's claims against defendants in their individual capacities are barred by absolute immunity. The doctrine of absolute judicial immunity bars claims against judges for actions not made "'in the clear absence of all jurisdiction.'" Stump v. Sparkman, 435 U.S. 349, 356-7 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1872)). The "clear absence of all jurisdiction" has been narrowly construed to encompass only actions taken outside the scope of all authority, as in the case of a probate judge adjudicating a criminal trial. See Stump, 435 U.S. at 357, n.7; Pierson v. Ray, 386 U.S. 547, 553 (1967).

In this case, the Second Department is statutorily authorized to suspend from practice any attorney engaged in professional misconduct, see N.Y. Jud. Law §90(2) (McKinney 1983), and to hear related challenges. As a result, Sassower has alleged no basis upon which a fact finder could rationally infer that defendant Judge Mangano and the associate justices of the Second Department acted outside their proper jurisdictional capacities in adjudicating Sassower's disciplinary petition and claims raised in relation thereto, let alone that they acted in the "clear absence **[R-19]** of all jurisdiction." Stump, 435 U.S. at 356-57; see also Pierson, 386 U.S. at 554.

Absolute immunity likewise bars Sassower's claims against the non-judicial defendants. Under the doctrine of quasi-judicial immunity, absolute immunity extends to administrative officials performing discretionary acts of a judicial nature. See Cleavinger v. Saxner, 474 U.S. 193, 200 (1985); Butz v. Economou, 438 U.S. 478, 513 (1978); Oliva v. Heller, 839 F.2d 37, 39 (2d Cir. 1988). Here, quasi-judicial immunity, which bars claims against administrative law judges and hearing examiners performing judicial functions, protects

hearing officer Galfunt in his individual capacity from liability. See Cleavinger, 474 U.S. at 200. In addition, because state bar disciplinary proceedings are clearly judicial in nature, see Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433-34 (1982), quasi-judicial immunity bars claims against state bar disciplinary committee members Casella, Sumber and the members of the Grievance Committee.[6] See Klapper v. Guria, 582 N.Y.S.2d 892, 895 (N.Y. Sup. Ct. 1992) (quasi-judicial immunity bars action against counsel to state bar disciplinary committee and its members for prosecution and adjudication of disciplinary petition).

[R-20] In addition, Sassower's claims for damages against defendants in their official capacities are barred by the Eleventh Amendment, which precludes suits brought in federal court against a state or its agency, where, as here, there is no express statutory waiver or consent. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-02 (1984); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989); Trotman v. Palisades Interstate Park Comm'n, 557 F.2d 35, 38-40 (2d Cir. 1977). The Eleventh Amendment also bars actions against state officials sued in their official capacities where, as here, the state is the real party in interest. See Kentucky v. Graham, 473 U.S. 159, 169 (1985); Farid v. Smith, 850 F.2d 917, 921 (2d Cir. 1988). In addition, defendant Grievance Committee, as "part of the judicial arm of the state of New York," Zuckerman v. Appellate Div., 421 F.2d 625, 626 (2d Cir. 1970), is not a "person" amenable to suit under §1983. Rapoport v. Departmental Disciplinary Comm. For the First Judicial Dep't, No. 88 Civ. 5781 (MJL), 1989 WL 146264 at *1 (S.D.N.Y. Nov. 21, 1989).

In view of the early dismissal of Sassower's federal claims, the Court declines to exercise pendent jurisdiction over the remaining

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[6] Likewise, absolute prosecutorial immunity bars Sassower's claims against Attorney General Koppell, in which she claims he conspired to maliciously prosecute the disciplinary petitions against her in violation of her state and federal constitutional rights. See, e.g., Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (prosecutorial immunity bars claims for acts taken by prosecutor as an advocate for the state, regardless of motive); Imbler v. Pachtman, 424 U.S. 409 (1976).

state claim for intentional infliction of emotional distress. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-27 (1966); Diamond v. Am-Law Publishing Corp., 745 F.2d 142, 148 (2d Cir. 1984).

[R-21] CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment shall be and hereby is granted.[7] In addition, Sassower's cross-motions for a preliminary injunction, summary judgment, and reconsideration shall be and hereby are denied. The Clerk of Court is directed to enter judgment accordingly and close the above-captioned action.

It is **SO ORDERED.**

Dated: New York, New York
May 21, 1996

s/
John E. Sprizzo
United States District Judge

APPEARANCES

DORIS L. SASSOWER, Plaintiff, Pro Se, DLS-7527
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DENNIS C. VACCO, Attorney General of the State of New York
Counsel for Defendants
120 Broadway
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JAY WEINSTEIN
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Of Counsel

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[7] In light of the dismissal of Sassower's claims, the Court need not consider defendants' requests for dismissal pursuant to Federal Rule of Civil Procedure 41(b) or for abstention.

PETITIONER'S VERIFIED COMPLAINT, filed June 20, 1994
Southern District of New York: 94 Civ. 4514

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DORIS L. SASSOWER,

Plaintiff,

94 Civ.

-against-

VERIFIED COMPLAINT
Jury Trial Demanded

Hon. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants.

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DORIS L. SASSOWER, as and for her Verified Complaint herein, respectfully sets forth and alleges:

NATURE OF THE ACTION

1. This is an action for declaratory judgment and other equitable relief, as well as for money damages, compensatory and punitive, against the above-named Defendants to redress their wilful and deliberate deprivation of rights secured to Plaintiff by the

constitutions and laws of the United States and the State of New York, by acting, separately and in concert, to cause and to perpetuate to the present date an unlawful, unconstitutional, retaliatory, politically motivated "interim" suspension of Plaintiff's professional license to practice law by Order of Defendants SECOND DEPARTMENT, dated June 14, 1991, and for participating in a criminal conspiracy in furtherance thereof.

2. Plaintiff seeks to have this Court declare as null and void said "interim" suspension Order and all other disciplinary Orders rendered against her under A.D. #90-00315, as well as the statutory provisions and court rules by which those Orders were wrongfully procured against Plaintiff, to wit, 22 N.Y.C.R.R. §691.4 and, particularly, §691.4(l)(1) and §691.13(b)(1) and Judiciary Law §90(2) and §90(10), as written and applied, so as to declare Plaintiff a member of the bar of the State of New York in good standing and restore to her all rights, privileges and immunities with respect to her license to practice law.

3. On June 14, 1991, DEFENDANT SECOND DEPARTMENT, without notice of formal charges, without a hearing, without a finding of probable cause, or any other findings, administrative or judicial, and without any jurisdiction whatsoever, by a so-called "interim" Order, suspended Plaintiff's license to practice law immediately, unconditionally, and indefinitely (Exhibit "A"). Defendant SECOND DEPARTMENT and Defendant Casella, acting under its auspices and direction, knew such Order to be unlawful and fraudulent and that it was being rendered for political, personal, and private ulterior motivations, totally outside the scope of their judicial/official duties for the sole purpose of discrediting, defaming and destroying Plaintiff to cause her to cease her activities in exposing judicial corruption.

4. Since June 14, 1991 and for the three years to the present date, Defendant SECOND DEPARTMENT, aided and abetted by Defendants CASELLA, SUMBER, and GRIEVANCE COMMITTEE, has knowingly and deliberately abused its disciplinary powers by acting without jurisdiction and beyond the scope of its judicial functions, in violation of Plaintiff's constitutional and statutory rights by issuing, and refusing to vacate, the June 14, 1991 interim suspension Order. Notwithstanding Plaintiff was deprived of any hearing, administrative or judicial, prior to the issuance of the

June 14, 1991 "interim" suspension Order, which did not arise out of any case or controversy then pending before Defendants SECOND DEPARTMENT or GRIEVANCE COMMITTEE, Defendant SECOND DEPARTMENT has refused to direct a post-suspension hearing as to the alleged basis of the "interim" suspension. Simultaneously, it has authorized prosecution of retaliatory and knowingly baseless disciplinary proceedings against Plaintiff.

5. This retaliation was part of an ongoing "vendetta" against Plaintiff by Defendant SECOND DEPARTMENT, going back to 1979, when it authorized Defendant GRIEVANCE COMMITTEE to bring legally insufficient and frivolous disciplinary proceedings against Plaintiff and her ex-husband, George Sassower. As a result of the bias then extent against them in the Second Department, those proceedings were transferred to the Appellate Division, First Department. Plaintiff and her former spouse were thereafter acquitted of all 32 "bogus" charges against [them], which the Appellate Division, First Department found to be so frivolous as to Plaintiff that it not only granted dismissal thereof, but gave her leave to seek sanctions against her prosecutors in the Second Department.

6. Thereafter, Defendant SECOND DEPARTMENT has deliberately failed and refused to transfer any matters involving Plaintiff out of the department. Instead, Plaintiff has been "targeted" for disciplinary investigation and prosecution in a selective, discriminatory and invidious manner.

7. Said prosecutions were designed to intimidate, coerce and bankrupt Plaintiff and so exhaust her physically, emotionally, and mentally that she would cease her exercise of First Amendment rights and, particularly, her public activities challenging judicial corruption.

8. Insofar as this action seeks prospective equitable relief against the above-named Defendants, it does not violate, directly or indirectly, the constitutional prohibition contained in Amendment XI of the U.S. Constitution.

9. Insofar as this action seeks monetary damages for constitutional torts committed by the above-named Defendants, such relief is based on the fact that the suspension order in question did not arise out of any case or controversy pending before the Second Department which, therefore, was acting in clear and complete absence of jurisdiction and outside its judicial functions. Liability is

sought against such Defendants in their personal capacities, by reason of their actions, known to them to be outside the scope of their respective offices and in gross abuse of their public offices. By reason thereof, the financial burden of their defense is not sought to be imposed on the sovereign state of New York, but on Defendants personally.

10. The Attorney-General's official and personal liability is predicated on his deliberate and knowing complicity in the wrongful and criminal conduct of his clients, whom he has defended with knowledge that their defense rested on perjurious factual allegations made by members of his legal staff and wilful misrepresentation of the law applicable thereto.

JURISDICTION AND VENUE

11. Jurisdiction to grant declaratory relief is conferred by Title 28 U.S.C. §2201, §2202. Jurisdiction to grant monetary relief is granted by Title 28 U.S.C. §1331 and §1343(3) and Title 42 U.S.C. §1983, §1985(3), and §1988. The rights, privileges and immunities claimed to have been violated are those guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

12. Venue lies in the Southern District of New York in that, pursuant to 28 U.S.C. §1391, Plaintiff and various Defendants reside and have their offices within said district and a substantial part of the events or omissions giving rise to the claim occurred there.

THE PARTIES

A. The Plaintiff

13. At all times hereinafter mentioned, Plaintiff was, and still is, an adult citizen of the United States, a native born American, residing in White Plains New York. Prior to Defendant SECOND DEPARTMENT's June 14, 1991 "interim" suspension Order, Plaintiff had, for more than twenty-five years, lived and maintained offices for the practice of law in Westchester County, which is under the jurisdiction of the Appellate Division, Second Judicial Department. Prior thereto, Plaintiff maintained her law offices

exclusively in the First Department, where she was admitted to the bar of the State of New York in 1955, after fulfilling its required educational requirements and passing a state-administered bar examination.

14. At the time of the June 14, 1991 "interim" suspension Order, Plaintiff, as Defendants knew, had no record of any prior disciplinary convictions. She was well-known as a distinguished matrimonial and human rights lawyer, lecturer and writer, and had been in continuous good standing at the bar for over thirty-five years. She had a thriving private practice, an outstanding career and a national reputation based on her legal writings, her public advocacy in the area of equal rights and law reform, and her litigation accomplishments in both the private and public sector. She was consistently professional rated "AV" by Martindale-Hubbell's Law Directory and, in June 1989, was elected as a Fellow of the American Bar Foundation. Such honor is reserved for less than one-third of one percent of the practicing bar in each State.

15. Defendants knew that Plaintiff had been President of the New York Women's Bar Association and had a long background in the area of judicial reform. She had served on committees to reform the judicial selection process and had written and been published on the subject in The New York Law Journal.

16. For eight years, from 1972 to 1980, Plaintiff had served as the first woman appointed to the Judicial Selection Committee of the New York State Bar Association. In that capacity, Plaintiff interviewed and participated in the evaluation of every candidate for the New York State Court of Appeals, the Appellate Divisions, and the Court of Claims. She herself was nominated as a candidate for the Court of Appeals in 1972.

17. At relevant times hereinafter mentioned, commencing in or about August 1989, Plaintiff publicly expressed her opinion as to the unfitness of Hon. Samuel G. Fredman, a former Chairman of the Westchester County Democratic Committee, then sitting as a Supreme Court justice in Westchester County by interim appointment of Governor Mario Cuomo.

18. At relevant times hereinafter mentioned, Plaintiff publicly expressed her opinion, beginning in or about September 1989, that a certain cross-endorsement Deal between the Republican and Democratic Party leadership (Exhibit "B") in late August 1989,

involving the trading of seven judgeships, thereafter implemented at illegally conducted Judicial Nominating Conventions held in or about September 1989, was corrupt and a fraud upon the public and an unconstitutional disenfranchisement of the voters under the New York State Constitution.

B. The Defendants

19. At relevant times hereinafter mentioned, Defendant SECOND DEPARTMENT was, and still is, the state body with exclusive jurisdiction authorized by Judiciary Law §90(2) to discipline by censure, suspension, and disbarment members of the bar within the Second Department who are "guilty of professional misconduct". Defendant GUY MANGANO was and still is the Presiding Justice thereof, and personally participated in the June 14, 1991 "interim" suspension Order and every other disciplinary Order affecting Plaintiff under A.D. #90-00315.

20. Upon information and belief, at all relevant times hereinafter mentioned, Defendant GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT (hereinafter "Defendant GRIEVANCE COMMITTEE") was, and still is, the disciplinary agency, operating as an arm of the Defendant SECOND DEPARTMENT, appointed by it, pursuant to 22 N.Y.C.R.R. §691.4(a), to investigate and prosecute matters involving attorneys in the Ninth Judicial District.

21. Upon information and belief, since November 1990, Defendant SUMBER has been the Chairman of Defendant GRIEVANCE COMMITTEE, appointed by Defendant SECOND DEPARTMENT. Defendant SECOND DEPARTMENT, likewise, has appointed all members of Defendant GRIEVANCE COMMITTEE, herein collectively referred to as Does 1-20.

22. Upon information and belief, at relevant times hereinafter mentioned, Defendant GARY CASELLA (hereinafter "Defendant CASELLA") was, and still is, Chief Counsel of Defendant GRIEVANCE COMMITTEE, appointed by Defendant SECOND DEPARTMENT pursuant to 22 N.Y.C.R.R. §691.4(b), on an at-will basis, serving at the pleasure of Defendant SECOND DEPARTMENT.

23. Upon information and belief, at relevant times

hereinafter mentioned, Defendant MAX GALFUNT (hereinafter "Defendant GALFUNT") was, and still is, a Special Referee regularly appointed by Defendant SECOND DEPARTMENT to hear disciplinary matters, on an at-will, per diem basis, serving at the pleasure of Defendant SECOND DEPARTMENT.

24. Upon information and belief, at relevant times hereinafter mentioned, Defendant G. OLIVER KOPPELL was, as of January 1994, Attorney General of the State of New York, to which public office he was duly appointed by interim appointment of Governor Mario Cuomo to fill the unexpired term of former Attorney-General Robert Abrams, who resigned. Prior thereto, Defendant KOPPELL was a member of the New York State Legislature, Chairman of the Assembly Judiciary Committee, who, as such, was given by Plaintiff a full set of the court papers in Castracan v. Colavita and Sady v. Murphy, hereinafter more fully detailed, as well as copies of complaints relative thereto filed with the New York State Commission on Judicial Conduct, documenting the corruption of sitting state court judges.

25. During all times mentioned in this Complaint, the aforesaid Defendants were acting in their official capacities and under color of law, that is, under color of the Constitution, rules, regulations, and of the customs and usages of the State of New York.

26. At all times mentioned in this Complaint, the Defendants MANGANO and other justices of Defendant SECOND DEPARTMENT, Defendants CASELLA, SUMBER, GRIEVANCE COMMITTEE, and GALFUNT have acted jointly and in concert with each other, in unlawful conspiracy to deprive Plaintiff of her constitutionally protected rights, within the meaning of 43 U.S.C. §1983. Since April 28, 1993 and continuing up to the present time, the Attorney General of the State of New York, has also, acting jointly and in concert with the above-named Defendants, deprived Plaintiff of her constitutional rights, by covering up their misconduct through perjury and deceit committed by members of his staff, with his full knowledge and tacit approval.

27. At all times mentioned in this Complaint, each of the above-named Defendants had the duty and the opportunity to protect Plaintiff from the unlawful actions of the other Defendants, but each Defendant failed and refused to perform such duty, thereby proximately causing Plaintiff's injuries.

FACTUAL ALLEGATIONS

28. In May 1989, Samuel G. Fredman, a former Chairman of the Westchester County Democratic Committee, who was a matrimonial attorney, without prior judicial experience, took office as a Supreme Court justice of the Ninth Judicial District, by appointment of Hon. Mario Cuomo, Governor of the State of New York. Upon information and belief, said appointment was a political "pay-back" to Mr. Fredman for his delivery of the Westchester Democratic vote to Governor Cuomo, when he first ran for office in 1982.

29. The position Mr. Fredman was appointed to fill was an interim vacancy, created, upon information and belief, as part of a larger judge-trading deal between the Westchester Republican and Democratic Party Chairmen, consummated in 1989, by the pre-arranged early resignation of Supreme Court Justice Lucille Buell, a Westchester County Republican, whose term was to expire on December 31, 1989, thereby permitting an interim appointment by the Governor.

30. In or about May 1989, Harvey Landau, Esq. was a member of the Scarsdale Democratic Club, actively promoting the nomination of Samuel G. Fredman for a full fourteen year term in the November 1989 general elections.

31. On or about June 22, 1989, Mr. Landau, as successor counsel to Plaintiff's law firm in a divorce action entitled Breslaw v. Breslaw, presented to Justice Fredman a false, fraudulent, and facially deficient Order to Show Cause, seeking to hold Plaintiff and her professional corporation in contempt and for sanctions against them based upon the alleged refusal to turn over to him their legal files relating to Mrs. Breslaw's divorce action, which Justice Fredman signed.

32. At the time the aforesaid contempt motion was presented, Justice Fredman had no prior involvement in the Breslaw matter, but had considerable prior professional involvement with Plaintiff, who had been his adversary and professional competitor for many years, during which he had evidenced hostility and vicious feelings toward her and the public and professional positions she had espoused.

33. Justice Fredman did not disqualify himself from consideration of Mr. Landau's Order to Show Cause to punish Plaintiff for contempt, which was factually, legally, and jurisdictionally baseless as a matter of law, as would have been obvious to any unbiased and competent judge.

34. On June 30, 1989, Plaintiff appeared in Justice Fredman's part for the return date of her own pending Order to Show Cause for reargument of the Order which was the subject of Mr. Landau's Order to Show Cause. Mr. Landau failed to appear on such return date and Justice Fredman, over Plaintiff's objection, engaged in ex parte communication with Mr. Landau. Upon conclusion of such ex parte communication, Mr. Landau's untimely opposing papers were received by the Court, and Justice Fredman further denied Plaintiff an adjournment to reply thereto, as well as an adjournment of Mr. Landau's contempt Order to Show Cause, whose July 10, 1989 return date Plaintiff informed the Court was for a day she was scheduled to be out of the country.

35. By letter hand-delivered to Justice Fredman's Chambers, Plaintiff notified Justice Fredman that in view of the Court's denial of her requested adjournment of the first-time on pending motions and its ex parte conversation with Mr. Landau, she would be retaining counsel in the contempt proceeding. She requested thirty days for such purpose.

36. Justice Fredman's mailed letter response denied Plaintiff any adjournment--notwithstanding Judiciary Law §756 mandates the right to counsel in contempt proceedings. Said letter did not arrive at Plaintiff's law firm until late in the morning on July 10, 1989, at which time Plaintiff's secretary called the court, offering to send over an attorney.

37. Justice Fredman's law secretary advised that that was unnecessary.

38. The court records show that the Breslaw matter was not on the calendar on July 10, 1989, that there were no appearances noted, and that no default was taken against Plaintiff or her law firm.

39. Nonetheless, on July 13, 1989, Justice Fredman issued a defamatory decision prejudging Plaintiff guilty of the underlying contempt charged by Mr. Landau and excoriating her for what he termed her "capricious disappearance" on July 10, 1989, which he characterized as a "gross insult visited"upon him personally,

constituting a further contempt. Without giving Plaintiff any opportunity to be heard with respect thereto, Justice Fredman then released his defamatory July 13, 1989 decision to the New York Law Journal and local press.

40. Within a week of publication by The New York Law Journal on July 24, 1989 and articles on the contempt proceeding by the local Gannett newspaper, on information and belief, Defendant GRIEVANCE COMMITTEE rendered an ex parte report concerning Plaintiff, which it thereafter filed with Defendant SECOND DEPARTMENT.

41. Plaintiff has never seen such ex parte July 31, 1989 report, discovery of which has been consistently denied her by Defendants CASELLA and SECOND DEPARTMENT.

42. Upon information and belief, the ex parte July 31, 1989 report related to complaints by two former clients, arising out of fee disputes with Plaintiff's law firm. Said complaints, pending since 1987 and 1988, had not been the subject of any further inquiry by Defendant GRIEVANCE COMMITTEE following Plaintiff's final submission of written responses thereto. Defendant GRIEVANCE COMMITTEE never notified Plaintiff of any intent to take disciplinary steps, and never served her with pre-petition written charges or afforded her a pre-petition hearing, as 22 N.Y.C.R.R. §691.4(e)(4) and (f) require. The nature of the complaints, as reflected by their lengthy pendency before Defendant GRIEVANCE COMMITTEE, made the exigency exception under §691.4(e)(5) inapplicable.

43. On August 15, 1989, Justice Fredman denied Plaintiff's motion for his recusal based on his personal bias and pre-existing hostility toward her. Neither Justice Fredman nor Mr. Landau disclosed their on-going political relationship.

44. On August 24, 1989, Respondent SECOND DEPARTMENT denied Plaintiff's application for leave to appeal Justice Fredman's Order denying recusal.

45. On August 30, 1989, Justice Fredman, in the presence of the press, held Plaintiff in summary contempt. Plaintiff thereupon brought an Article 78 proceeding against Justice Fredman, who later withdrew the summary contempt after being informed by the Attorney General that it could not defend same.

46. Upon information and belief, on or before August 30,

1989, the political leadership of the Westchester Democratic and Republican Parties formalized, by a written document, the negotiations that had been taking place over the preceding year relating to trading of judgeships in the Ninth Judicial District. The document set forth a three-year deal [hereinafter "the Deal" (Exhibit "B") by which, through cross-endorsements, the Democratic and Republican parties bartered Supreme and County judgeships, including the surrogate judgeship of Westchester County, upon agreed terms and conditions, including a contracted-for resignation of a Supreme Court judge and a split of judicial patronage along party lines.

47. Upon information and belief, the principal architect and beneficiary of the Deal was Justice Fredman.

48. Upon information and belief, the Deal was ratified by the Executive Committees of the Democratic and Republican parties of the counties comprising the Ninth Judicial District--Westchester, Putnam, Dutchess, Orange, and Rockland. It was then implemented at the Judicial Nominating Conventions conducted in September 1989 which, pursuant to the Deal, nominated Justice Fredman, then 64 years of age to a 14-year term on the Supreme Court.

49. The Democratic Judicial Nominating Convention was held on September 19, 1989 and personally witnessed by Plaintiff, as a member of the Ninth Judicial Committee, a citizens' group organized by Eli Vigliano, Esq., who was also present at the Convention and witnessed same.

50. In an October 1, 1989 article published in the Westchester edition of The New York Times, Plaintiff as well as Mr. Vigliano were quoted as "attempting to mount a legal challenge".

51. Within the next ten days, Plaintiff gave information to the Judiciary Committee of the Westchester Bar Association and Women's Bar Association concerning Justice Fredman's unfitness for the judicial office to which he had been nominated by both major parties. By letter dated October 5, 1989, Plaintiff sent a copy of her written submission concerning Justice Fredman to the New York State Commission on Judicial Conduct, which dismissed her complaint, without investigation, by letter dated November 28, 1989.

52. On November 1, 1989, Mr. Vigliano, on behalf of the Ninth Judicial Committee, hand-delivered a written complaint to Governor Cuomo's Manhattan office, copies of which he filed with the New York State Board of Elections and the New York State

Commission on Judicial Conduct, entitled "Election Fraud in the Ninth Judicial District". Mr. Vigliano contended that the three-year Deal was illegal and a fraud upon the voters, as were the Judicial Nominating Conventions, which he detailed as violative of the Election Law in numerous respects, set forth by him. Mr. Vigliano further noted the perjurious nature of Certificates of Nomination, signed by the permanent chairman and secretary of each party, all lawyers.

53. The Governor's Office referred Mr. Vigliano's complaint to the New York State Board of Elections which, thereafter, dismissed it without investigation and without notice to Mr. Vigliano. On information and belief, the New York State Commission on Judicial Conduct took no action on Mr. Vigliano's November 3, 1989 complaint to it.

54. On November 15, 1989, the local Gannett newspapers reported that Plaintiff had been recently released from a psychiatric hospital, which she voluntarily entered following her collapse resulting from Justice Fredman's abusive treatment and public humiliation of her in the Breslaw case.

55. Notwithstanding that under 22 N.Y.C.R.R. §691.4(k) disciplinary proceedings are to be given a preference by the court, it was not until December 14, 1989 that Defendant SECOND DEPARTMENT rendered, ex parte, an Order authorized prosecution of a disciplinary proceeding against Plaintiff based on alleged "acts of professional misconduct set forth in the committee's report, dated July 31, 1989" -- almost five months earlier.

56. Said four month lapse demonstrates that Defendant GRIEVANCE COMMITTEE had not relied on the exigency exception under 22 N.Y.C.R.R. §691.4(e)(5) when it filed its ex parte July 31, 1989 report, without first complying with requisite pre-petition requirements.

57. Defendant SECOND DEPARTMENT's ex parte December 14, 1989 Order did not allege compliance by Defendant GRIEVANCE COMMITTEE with pre-petitions requirements, set forth in 22 N.Y.C.R.R. §691.4(e)(4), §691.4(f), and §691.4(h) of notice, written charges, a hearing, and findings based on evidentiary proof or that it was proceeding under the exigency provision of §691.4(e)(5).

58. No copy of the aforesaid ex parte December 14, 1989

Order was served upon Plaintiff. .

59. On February 8, 1990, Plaintiff was personally served with a Notice of Petition and Petition dated February 6, 1990. The Petition, signed by then-Chairman of Defendant GRIEVANCE COMMITTEE, William Geoghegan, was made entirely "upon information and belief", with Mr. Geoghegan's Verification thereof resting wholly on Defendant SECOND DEPARTMENT's ex parte December 14, 1989 Order, rather than any recommendation for prosecution by Defendant GRIEVANCE COMMITTEE in its ex parte July 31, 1989 report.

60. No copy of Defendant SECOND DEPARTMENT's ex parte December 14, 1989 Order or Defendant GRIEVANCE COMMITTEE's ex parte July 31, 1989 report were annexed to, or served with, the February 6, 1990 Petition.

61. On March 8, 1990, Plaintiff, by her attorney, Eli Vigliano, Esq., served her Verified Answer, dated March 7, 1990, which denied knowledge or information sufficient to form a belief as to the ex parte July 31, 1989 report, as well as of Defendant GRIEVANCE COMMITTEE's compliance with Judiciary Law §90 and §691.4, alleged as jurisdictional allegations in the Petition.

62 Plaintiff's Verified Answer further pleaded two complete affirmative defenses, including that Plaintiff was "being made the subject of invidious, discriminatory, retaliatory, selective disciplinary action denying her, inter alia, the equal protection of the laws".

63. In April 1990, Justice Fredman, in the still unresolved Breslaw contempt proceeding, telephoned Plaintiff's psychiatrist, without Plaintiff's knowledge or consent, and directed him to appear in court--under threat that he would otherwise be brought to court by a sheriff--to respond to his inquiries as to Plaintiff's medical condition.

64. On April 13, 1990, over the objection of counsel appearing on Plaintiff's behalf and in her absence, Justice Fredman violated Plaintiff's physician-patient privilege under CPLR §4504, directing Plaintiff's physician to testify in court and in the presence of the press, which thereafter published report of same.

65. At taxpayer expense, Justice Fredman ordered the court reporter to transcribe the April 13, 1990 court proceeding on an expedited basis and, on April 20, 1990, issued a personally

derogatory and defamatory decision, wherein he made an adjudication based on the physician's testimony that Plaintiff was mentally capacitated.

66. Both the April 13, 1990 court transcript and Justice Fredman's April 20, 1990 decision were then annexed to an Order to Show Cause brought by Defendant CASELLA seeking a court-ordered medical examination of Plaintiff pursuant to §22 N.Y.C.R.R. §691.13(b)(1) to determine whether she was mentally incapacitated and to suspend her upon such determination. Said Order to Show Cause, which Defendant CASELLA procured ex parte, was signed on May 8, 1990 by Hon. Isaac Rubin, a Justice of Defendant SECOND DEPARTMENT , whose Westchester Chambers were in close physical proximity to those of Justice Fredman and who was a member of the New York State Commission on Judicial Conduct when it received the 1989 complaints of Plaintiff and Mr. Vigliano, referred to at 52-3 hereinabove.

67. Defendant CASELLA's Order to Show Cause was palpably insufficient as a matter of law. Such application, pursuant to 22 N.Y.C.R.R. §691.13(b)(1), required a petition of Defendant GRIEVANCE COMMITTEE. No petition supported Defendant CASELLA's Order to Show Cause, but his attorney's affirmation, which failed to even allege that Defendant GRIEVANCE COMMITTEE had authorized his application under 22 N.Y.C.R.R. §691.13(b)(1).

68. Plaintiff's medical condition had never been placed in issue in any disciplinary proceeding, as reflected by the fact that Defendant CASELLA did not proceed under 22 N.Y.C.R.R. §691.13(c)(1). Nor did Defendant CASELLA's May 8, 1990 Order to Show Cause allege that it had been or that his application was in any way related to the February 6, 1990 Petition against Plaintiff.

69. The February 6, 1990 Petition was completely unrelated to Defendant CASELLA's May 8, 1990 Order to Show Cause and, therefore, not an underlying proceeding to such application.

70. Plaintiff opposed Defendant CASELLA's May 8, 1990 Order to Show Cause with a Cross-Motion to dismiss same for lack of personal and subject matter jurisdiction, stating that Defendant CASELLA had not shown that Defendant GRIEVANCE COMMITTEE had authorized him to bring such application or that

requisite pre-petition procedures had been followed.

71. Plaintiff further sought dismissal based on "unconstitutional invidious selectivity", specifically requesting "a pre-disciplinary hearing" to establish Defendant GRIEVANCE COMMITTEE's "continuous unending pattern of invidious selectivity" going back to its first disciplinary proceeding ever brought against her more than ten years earlier.

72. In support thereof, Plaintiff pointed out that when those earlier proceedings had been transferred to the Appellate Division, First Department, it threw out, on summary judgment, seventeen of the twenty charges made therein against Plaintiff, thereafter throwing out the remaining three charges in a November 18, 1981 Order, which gave leave to Plaintiff to seek sanctions against Defendant GRIEVANCE COMMITTEE for its frivolous conduct.

73. Plaintiff's complaint as to the constitutionally impermissible manner in which Defendant GRIEVANCE COMMITTEE had prosecuted those earlier proceedings and the unethical conduct of its Chief Counsel, Assistant Counsel, and its Chairman was reflected by the November 18, 1981 Order, annexed to her papers in support of her Cross-Motion.

74. Defendant CASELLA failed to present any proof that Defendant GRIEVANCE COMMITTEE had authorized him to make the May 8, 1990 Order to Show Cause for Plaintiff's suspension under 22 N.Y.C.R.R. §691.13(b)(1).

75. Under 22 N.Y.C.R.R. §691.4(k), disciplinary proceedings are to be given a preference by the court. Nonetheless, for more than four months Defendant SECOND DEPARTMENT did not adjudicate Defendant CASELLA's May 8, 1990 Order to Show Cause and Plaintiff's Cross-Motion until October 18, 1990--the day before Plaintiff was scheduled to argue the appeal in Castracan v. Colavita before the Appellate Division, Third Department.

76. In late September 1990, Plaintiff, acting as pro bono counsel to the Ninth Judicial Committee, filed a case in the Third Department under the Election Law, entitled Castracan v. Colavita, et al, challenging the three-year cross-endorsements Deal (Exhibit "B"), the 1990 phase of which was then being implemented, as well as the conduct of the 1990 Democratic and Republican Judicial Nominating Conventions, which the Petition alleged had violated the

New York State Election Law.

77. By decision/order dated October 17, 1990, Castracan v. Colavita was dismissed for failure to state a cause of action by the Supreme Court, Albany County, which stated that it could not address the legality of the Three-Year Deal, absent proof that the judicial nominating conventions implementing it had been illegally conducted. By such decision the lower court disregarded the legal standard for a motion to dismiss for failure to state a cause of action and falsified the record, which contained ample proof as to the violations of the Election Law at the judicial nominating conventions, inter alia, in the form of affidavits of three eye-witnesses to the conventions. No hearing was afforded the Castracan Petitioners to present further proof.

78. Notwithstanding the preference to which appeals in Election Law proceedings are automatically entitled by the Election Law and the rules of the Appellate Division, Third Department canceled , without reasons, the October 19, 1990 scheduled argument on the appeal in Castracan v. Colavita on October 18, 1990--the same day Defendant SECOND DEPARTMENT issued its Order on Defendant CASELLA's May 8, 1990 Order to Show Cause.

79. Defendant SECOND DEPARTMENT's October 18, 1990 Order , which it had delayed rendering for nearly four months, was not a lawful Order, being erroneous in at least seven material respects:

(a) It mischaracterized Plaintiff's Cross-Motion, which sought dismissal of Defendant CASELLA's May 8, 1990 Order to Show Cause, as seeking dismissal of a disciplinary proceeding authorized against her by a December 6, 1989 Order;

(b) There was no December 6, 1989 Order against Plaintiff, but only a December 14, 1989 Order, authorizing the February 6, 1990 Petition;

(c) Plaintiff's Cross-Motion did not challenge personal jurisdiction in "the underlying disciplinary proceeding", but rather contested Defendant CASELLA's service of the May 8, 1990 Order to Show Cause upon Plaintiff's daughter.

(d) There was no "underlying disciplinary proceeding" to Defendant CASELLA's May 8, 1990 Order to Show Cause--the February 6, 1990 Petition being completely separate and unrelated;

(e) Defendant SECOND DEPARTMENT's use of

the same docket number, A.D. 90-00315, for its October 18, 1990 Order as had been assigned to the February 6, 1990 Petition, to make it appear that there was some connection between them. There was none;

(f) Defendant SECOND DEPARTMENT's delegation to Defendant CASELLA, as Plaintiff's prosecutor, the court's authority to designate "qualified medical experts" was unauthorized by 22 N.Y.C.R.R. §691.13(b)(1).

(g) 22 N.Y.C.R.R. §691.13(b)(1) is not limited to examination by a single medical "expert", as ordered by Defendant SECOND DEPARTMENT, but rather by "medical experts".

80. By Order dated November 1, 1990--eight months after issue had been joined on Defendant GRIEVANCE COMMITEE's February 6, 1990 Petition by Plaintiff's March 7, 1990 Verified Answer--Defendant SECOND DEPARTMENT appointed Defendant GALFUNT, as special referee for the February 6, 1990 Petition.

81. Thereafter, Defendants GRIEVANCE COMMITTEE, CASELLA, and GALFUNT took no steps to proceed with the February 6, 1990 Petition.

82. Defendant CASELLA failed to notify Mr. Vigliano of the name of the medical expert he had designated to examine Plaintiff until December 1990. Defendant CASELLA and the doctor designated by him then refused to agree to any safeguards relative to Plaintiff's examination.

83. Thereafter, by letter dated January 10, 1991, Mr. Vigliano delineated several respects in which the October 18, 1990 Order was not authorized by 22 N.Y.C.R.R. §691.13(b)(1), the section invoked by Defendant CASELLA, requiring a plenary proceeding. Mr. Vigliano's letter distinguished that section from §691.13(c)(1), which Defendant CASELLA had not invoked and which was also inapplicable, Plaintiff never having raised her disability as a defense to the February 6, 1990 Petition. In view of this and other jurisdictional infirmities, Mr. Vigliano requested that Defendant GRIEVANCE COMMITTEE stipulate to vacatur of the October 18, 1990 Order, absent which he would make an application to the court.

84. Without addressing any of Mr. Vigliano's jurisdictional and legal objections, Defendant CASELLA responded, by letter dated January 15, 1991, that Defendant Grievance

Committee "does not and will not agree to voluntary vacatur".

85. Thereafter, both Defendant CASELLA and Plaintiff obtained Orders to Show Cause. Defendant CASELLA's Order to Show Cause, signed January 25, 1991, was made pursuant to 22 N.Y.C.R.R. §691.4(l)(1)(i) to immediately suspend Plaintiff for alleged "failure to comply" with Defendant SECOND DEPARTMENT's October 18, 1990 Order. Plaintiff's Order to Show Cause, signed January 28, 1991, was for vacatur of the October 18, 1990 Order as jurisdictionally void, as well as in opposition to Defendant CASELLA's Order to Show Cause.

86. Defendant CASELLA's January 25, 1991 Order to Show Cause for suspension was not supported by any petition by Defendant GRIEVANCE COMMITTEE setting forth any charge, based on a finding, that she was guilty of "failing to comply". It was supported only by Defendant CASELLA's attorney's affirmation, which further failed to allege that Defendant GRIEVANCE COMMITTEE had authorized his application.

87. Without addressing the jurisdictional issues, Defendant CASELLA's supporting affirmation now affirmatively represented, for the first time, that the unrelated February 6, 1990 Petition was "an underlying disciplinary proceeding"--which statement Defendant CASELLA knew to be false--and additionally represented that prosecution of the February 6, 1990 Petition had been delayed as a result of Plaintiff's alleged failure to comply--which he also knew to be false. Defendant CASELLA claimed that this was an "equally as important reason" for Plaintiff's immediate suspension.

88. Defendant CASELLA also used for his Order to Show Cause the same A.D. #90-00315 docket number as had been assigned to the February 6, 1990 Petition. This was intended to further the deceit that his motion for Plaintiff's suspension and the February 6, 1990 proceeding against her were related--which he knew they were not.

89. Plaintiff's January 28, 1991 Order to Show Cause and supporting papers sought sanctions against Defendant CASELLA and an investigation of his unethical conduct, vigorously denying and controverting Defendant CASELLA's conclusory and unsupported claim of Plaintiff's "failure to comply". Plaintiff's papers further showed that Defendant SECOND DEPARTMENT's October 18,

19[9]0 Order was not a "lawful demand", as 22 N.Y.C.R.R. §691.4(l)(1)(i) specifically requires.

90. Under 22 N.Y.C.R.R. §691.4(k), disciplinary proceedings are to be given a preference by the court. Nonetheless, more than four months elapsed before Defendant SECOND DEPARTMENT decided the aforesaid two motions and Defendant CASELLA's subsequent motion for sanctions against Mr. Vigliano. Orders thereon were rendered within a few days following a June 9, 1991 publication by The New York Times of Plaintiff's Letter to the Editor about the significance of the Castracan v. Colavita case, her intention to take it to the Court of Appeals, and the misconduct of Justice Fredman on the bench, and, likewise, within days of her transmittal to Governor Cuomo of an affirmation about Mr. Landau's unethical conduct in the Breslaw case for consideration by the Governor, then reported by local Gannett newspapers, as a prospective nominee of the Governor for an interim appointment on the Supreme Court in Westchester County. On June 11, 1991, Plaintiff filed a copy of said affirmation with Defendant GRIEVANCE COMMITTEE as a formal complaint by her against Mr. Landau.

91. By two Orders dated June 12, 1991, Defendant SECOND DEPARTMENT denied, without reasons, Mr. Vigliano's Order to Show Cause to vacate the October 18, 1990 Order and to discipline Defendant CASELLA and denied Defendant CASELLA's motion for sanctions against Mr. Vigliano, "with leave to renew upon a showing of continued frivolous conduct". Defendant SECOND DEPARTMENT did not identify what conduct by Mr. Vigliano it considered "frivolous".

92. Review of said papers shows no "frivolous" conduct having been committed by Mr. Vigliano, such statement being intended solely for the purpose of intimidation.

93. Two days later, on June 14, 1991, with no stay for review by the Court of Appeals nor time allowed for compliance with the challenged October 18, 1990 Order, Defendant SECOND DEPARTMENT issued its "interim" suspension Order granting Defendant CASELLA's Order to Show Cause, without any findings or statement of reasons therefor (Exhibit "A"). Said Order, of which Plaintiff was unaware until it was served upon her five days later, on June 19, 1991, had by then been released to the press by Respondent

SECOND DEPARTMENT.

94. At the time Defendant SECOND DEPARTMENT issued its June 14, 1991 Order (Exhibit "A"), Defendant SECOND DEPARTMENT knew that such "interim" suspension orders, without findings or stated reasons, were contrary to its own rules, as set forth in 22 N.Y.C.R.R. §691.4(l)(2), as well as controlling Court of Appeals' case law, as articulated in Matter of Nuey, 61 N.Y.2d 513 (1984), which required it to make findings.

95. Immediately upon service of the June 14, 1991 Order, Plaintiff made arrangements to be examined by the physician designated by Defendant CASELLA, who informed her that he was employed by Defendant GRIEVANCE COMMITTEE and would not provide a copy of his credentials to her, without first checking with Defendant CASELLA.

96. Thereafter, Defendant CASELLA's designated physician refused to supply Plaintiff with his credentials and Defendant CASELLA took the position that even were Plaintiff to submit to an examination, and even were there no finding of incapacity, he would, nonetheless, recommend that she remain suspended for what he termed her "flagrant" failure to comply with Defendant SECOND DEPARTMENT's October 18, 1990 Order.

97. Simultaneous with Plaintiff's arrangements to be medically examined, Plaintiff moved by Order to Show Cause to vacate and/or modify the June 14, 1991 "interim" suspension Order, with a TRO stay provision pending the determination of the motion. Defendant SECOND DEPARTMENT struck out such provision, notwithstanding Plaintiff's supporting affidavit stated her readiness to submit to a medical examination and that arrangements were in progress for same.

98. Plaintiff's aforesaid Order to Show Cause, which Defendant SECOND DEPARTMENT denied, without reasons, on July 15, 1991, argued that suspension of her license was unauthorized and excessive punishment for her attorney's legitimate legal challenge to its October 18, 1990 Order and that recusal of Respondent SECOND DEPARTMENT was warranted by the appearance that its June 14, 1991 Order was "swift retribution for the opinions expressed" by her in her aforesaid New York Times letter to the Editor and her filed complaint against Mr. Landau for his misconduct with Justice Fredman.

99. By letter dated June 21, 1991, Defendant CASELLA forwarded to Defendant GALFUNT, the referee assigned to hear the February 6, 1990 Petition, a copy of the June 14, 1991 "interim" suspension Order. In said letter, Defendant CASELLA represented the February 6, 1990 Petition as an "underlying proceeding", which would "of course" "be held in abeyance". Said representation was false and known to be false by Defendant CASELLA since the February 6, 1990 Petition was not an "underlying proceeding".

100. Within three weeks of service by Defendant CASELLA of the June 14, 1991 "interim" suspension Order, Defendant CASELLA notified Plaintiff that Defendant GRIEVANCE COMMITTEE had authorized two sua sponte complaints against her.

101. By letter dated June 28, 1991, Defendant CASELLA notified Plaintiff of a sua sponte complaint against her based on a decision, issued four days earlier by Justice Fredman in the Breslaw contempt proceeding. Said decision, which referred to Plaintiff's June 9, 1991 New York Times' Letter to the Editor, was rendered by Justice Fredman more than a year after the conclusion of the Breslaw contempt proceeding.

102. On its face, Justice Fredman's June 24, 1991 decision, which Defendant CASELLA enclosed with the sua sponte complaint, departed from accepted legal an judicial standards to an extent reflecting pathology.

103. By letter dated July 6, 1991, Defendant CASELLA notified Plaintiff of a sua sponte complaint based on the filing in Castracan v. Colavita of a Notice of Appeal to the Court of Appeals, bearing the name of Plaintiff's law firm, Doris L. Sassower, P.C., on June 20, 1991--the day following service of Defendant SECOND DEPARTMENT's June 14, 1991 "interim" suspension Order.

104. Plaintiff responded to each of the aforesaid sua sponte complaints, also requesting proof that they had been authorized by Defendant GRIEVANCE COMMITTEE and various information as to procedures followed by Defendant GRIEVANCE COMMITTEE in connection therewith. Defendants CASELLA and SUMBER failed and refused to provide such proof and to supply Plaintiff with a copy of any rules applicable to the operation of Defendant GRIEVANCE COMMITTEE.

105. Defendant CASELLA denied Plaintiff's further request that Defendant GRIEVANCE COMMITTEE transfer

complaints involving her to another judicial department, based on her long-standing complaints of retaliatory and invidious prosecution and misconduct, also refusing to provide proof that such request had been presented for Defendant GRIEVANCE COMMITTEE's consideration.

106. Defendant CASELLA refused to transfer Plaintiff's formal complaint against Mr. Landau out of the Second Judicial Department and sent it to the Grievance Committee for the Tenth Judicial District, which is under the authority of Defendant SECOND DEPARTMENT. In July 1991, its Chief Counsel dismissed Plaintiff's complaint, without presentment to that Committee and without requiring any response from Mr. Landau. Said disposition contradicts express procedures, outlined in a pamphlet distributed by the Grievance Committee for the Tenth Judicial District as "Advice to Complainants", that attorneys made the subject of "a proper complaint" will be required to respond thereto. Plaintiff's complaint was in all respects "a proper complaint".

107. By motion dated July 19, 1991, Plaintiff moved for leave to appeal to the Court of Appeals based, inter ~~alia~~, on Respondent SECOND DEPARTMENT's failure to comply with the requirements of 22 N.Y.C.R.R. §691.4, decisional law, and due process, as well as the unlawfulness of its October 18, 1990, procured by Defendant CASELLA without a petition, in violation of 22 N.Y.C.R.R. §691.13(b).

108. In opposition, Defendant CASELLA, without any evidentiary support, repeated that the February 6, 1990 Petition was an "underlying" disciplinary proceeding--which statement he knew to be false.

109. Such misrepresentations permitted Defendant CASELLA to argue to the New York State Court of Appeals that his May 8, 1990 Order to Show Cause did not require a petition, the February 6, 1990 Petition constituting authorization by the Committee for his two totally unrelated May 8, 1990 and January 25, 1991 Orders to Show Cause.

110. Defendant CASELLA further argued that the "interim" suspension of Plaintiff "constitutes a non-final, interlocutory order".

111. In August 1991, Plaintiff appeared before Defendant SECOND DEPARTMENT, together with Mr. Vigliano, who was

arguing the appeal of Sady v. Murphy, which challenged the third phase of the 1989 Three-Year Deal, then being implemented. During oral argument, Defendant MANGANO as well as Justice William Thompson, a member of the New York State Commission on Judicial Conduct, expressed views as to the corrupt and unethical nature of the Deal and the petitioners' entitlement to a hearing, of which they had been deprived by the lower court.

112. Justice Thompson, speaking of the contracted-for-resignation of a Supreme Court justice, required by the Deal, stated that such violated "ethical rules and would not be approved by the Commission on Judicial Conduct" and, further, that "a judge can be censured for that".

113. Defendant MANGANO recognized the contractual nature of the Deal and the criminal ramifications thereof stating that those involved would "have a lot more to worry about than this lawsuit when this case is over".

114. Nonetheless, on August 21, 1991, Respondent SECOND DEPARTMENT dismissed Sady v. Murphy in a one-line decision that "petitioners failed to adduce evidence sufficient" to invalidate the challenged nomination--when it knew, as reflected from its statements, that the written Deal was illegal, as a matter of law, and, further that the petitioners in Sady had been denied their right to a hearing to present proof, if such were deemed necessary.

115. On August 28, 1991, Plaintiff appeared with Mr. Vigliano before the Court of Appeals, in connection with Mr. Vigliano's appeal from Defendant Second Department's dismissal of Sady v. Murphy. Judge Richard Simon, who heard the leave application, called the 1989 Three-Year Deal, "a disgusting deal" and made a statement that trading judgeships represented an exchange of valuable consideration under the Election Law.

116. Nonetheless, on that same day, August 28, 1991, the Court of Appeals dismissed the appeal of right in Sady v. Murphy on the ground that "no substantial constitutional question is directly involved" and denied the motion for leave to appeal.

117. On September 10, 1991, the New York State Court of Appeals denied Plaintiff's motion for leave to appeal from the June 14, 1991 "interim" suspension Order. The following month, on October 15, 1991 it dismissed the appeal as of right filed by Mr. Vigliano on behalf of the Petitioners in Castracan v. Colavita, on the

ground that "no substantial constitutional question is directly involved".

118. On October 24, 1991, Plaintiff wrote a letter to Governor Cuomo, requesting appointment of a special prosecutor to investigate the politicization of the bench and corruption of the judicial process, documented by the files in Castracan v. Colavita, its companion case, Sady v. Murphy, the Breslaw contempt proceeding before Justice Fredman, and Defendant SECOND DEPARTMENT's suspension of her license, which Plaintiff's letter asserted to be without legal and factual basis and retaliatory.

119. Plaintiff sent copies of said letter, directly critical of Defendant SECOND DEPARTMENT and the New York State Court of Appeals to those courts, as well as to the Administrative Judge of the Ninth Judicial District, in addition to agencies of government, such as the New York State Commission on Judicial Conduct, and government leaders, such as Defendant KOPPELL, then Chairman of the Assembly Judiciary Committee. Thereafter, Plaintiff filed additional complaints with the New York State Commission on Judicial Conduct, copies of which Defendant KOPPELL also received.

120. All s aid complaints were subsequently dismissed by the New York State Commission on Judicial Conduct, without investigation.

121. In or about October 1991, Plaintiff moved to transfer a case in which she was personally involved as a defendant from the Ninth Judicial District, based, inter alia, on her activities as pro bono counsel to the Ninth Judicial Committee and to the Petitioners in Castracan v. Colavita. Said motion was denied by the Administrative Judge for the Ninth Judicial District, who then personally assigned the case to Supreme Court Justice Nicholas Colabella.

121. Undisclosed to Plaintiff was that Justice Colabella had been a childhood friend and former law partner of Anthony Colavita, the first named respondent in Castracan v. Colavita, and had himself been offered the Westchester surrogate judgeship under the three-year Deal challenged by that case.

122. As the judge assigned to the case of Wolstencroft v. Sassower, Justice Colabella knowingly and deliberately rendered a succession of legally improper and severely prejudicial rulings. He refused to recuse himself when application was made therefor by

Plaintiff, during which he admitted his relationship with Mr. Colavita to be on-going.

123. Thereafter, as a result of Justice Colabella's wilful disregard of black-letter law as to jurisdiction and due process, Plaintiff brought two CPLR Article 78 proceedings against him before Defendant SECOND DEPARTMENT. Plaintiff's first Article 78 proceeding against Justice Colabella was brought on February 13, 1992, following issuance by Justice Colabella of a February 10, 1992 decision and accompanying order & warrant of commitment. By the papers in such proceedings, Defendant SECOND DEPARTMENT became aware of the extreme physical and mental harassment to which Plaintiff was being mercilessly subjected by Justice Colabella.

124. By letter dated March 2, 1992, Defendant CASELLA notified Plaintiff that Defendant GRIEVANCE COMMITTEE had "authorized" a sua sponte complaint based on Justice Colabella's aforesaid February 10, 1992 decision.

125. By ex parte letter dated March 6, 1992, Defendant CASELLA advised the Presiding Justice of Defendant SECOND DEPARTMENT that Defendant GRIEVANCE COMMITTEE had "unanimously voted" to hold prosecution of the February 6, 1990 Petition in abeyance during the period of Plaintiff's suspension, further noting that he intended to take no action upon the two sua sponte complaints in the Breslaw and Castracan matters, which he identified as then "pending" before Defendant GRIEVANCE COMMITTEE.

126. Based on Defendant CASELLA's aforesaid March 6, 1992 ex parte letter--as to which Plaintiff had no knowledge--Defendant SECOND DEPARTMENT, issued two Orders dated April 1, 1992. By the first, Defendant SECOND DEPARTMENT denied what it called Defendant GRIEVANCE COMMITTEE's ex parte "application" to hold prosecution of the February 6, 1990 Petition in abeyance and directed Defendant GRIEVANCE COMMITTEE to proceed to prosecute same. By the second, Defendant SECOND DEPARTMENT authorized a supplemental petition, claiming that Defendant GRIEVANCE COMMITTEE was seeking to supplement the February 6, 1990 Petition and "to prosecute additional allegations based upon acts of professional misconduct which form the basis of sua sponte complaints pending" before it.

127. Defendant CASELLA and GRIEVANCE COMMITTEE did not challenge Defendant SECOND DEPARTMENT's April 1, 1992 Orders, the first of which overrode Defendant GRIEVANCE COMMITTEE's unanimous vote, the second of which falsified the facts in claiming that Defendant GRIEVANCE COMMITTEE was seeking to prosecute a supplemental petition when, it had not done so. Instead, Defendant CASELLA compliantly served a Supplemental Petition, dated April 9, 1992, signed by Defendant SUMBER, with the same docket number as the separate and unrelated February 6, 1990 Petition, A.D. #90-00315.

128. The April 9, 1992 Supplemental Petition, which lacked a Verification, was--like the February 6, 1990 Petition--pleaded entirely "on information and belief". It embodied Defendant GRIEVANCE COMMITTEE's two sua sponte complaints in Castracan and Breslaw, as to which Defendant GRIEVANCE COMMITTEE had never notified Plaintiff of any intent to take disciplinary steps and never served her with pre-petition written charges or afforded her a pre-petition hearing, as 22 N.Y.C.R.R. §691.4(e)(4) and (f) require.

129. Plaintiff's "interim" suspension made the exigency exception under §691.4(e)(5) inapplicable.

130. Additionally, the April 9, 1992 Supplemental Petition added a charge that had never before been presented to Plaintiff by Defendant GRIEVANCE COMMITTEE for response and which was not authorized by Defendant SECOND DEPARTMENT's second April 1, 1992 Order, which referred only to the "sua sponte complaints pending with the petitioner". Said unauthorized charge rested on Plaintiff's alleged post-suspension "non-compliance" with Defendant SECOND DEPARTMENT's October 18, 1990 Order directing her medical examination by a "medical expert" designated by Defendant CASELLA.

131. Thereafter, by letter dated May 5, 1992, Defendant CASELLA notified Plaintiff that, as part of the sua sponte complaint on Wolstencroft, he was requiring her response to a decision of Justice Colabella rendered the previous day, May 4, 1992.

132. By letter, dated May 29, 1992, Defendant CASELLA notified Plaintiff that Defendant GRIEVANCE COMMITTEE had "authorized" a further sua sponte complaint based on another matter

before Justice Colabella, F. Gordon Realty v. Donald J. Fass.

132. By letter dated June 11, 1992, Plaintiff sought disclosure of exculpatory and other materials in the possession of Defendant GRIEVANCE COMMITTEE, inquiring whether such materials, as well as documents supplied by Plaintiff in responding to disciplinary complaints against her, had been presented and reviewed by Defendant GRIEVANCE COMMITTEE, the date, and what action had been taken with respect thereto.

133. By letter of the same date, Defendant CASELLA stated that Plaintiff was "not entitled to information concerning the internal workings of the Committee in these matters". Defendant CASELLA admitted that Defendant GRIEVANCE COMMITTEE's prosecution of the disciplinary proceedings against Plaintiff rested entirely on unsworn statements.

134. By motion dated June 16, 1992, Plaintiff moved to vacate Defendant SECOND DEPARTMENT's June 14, 1991 "interim" suspension based on the Court of Appeals' supervening May 22, 1992 decision in Matter of Russakoff, 72 N.Y.2d 520, because of Respondent SECOND DEPARTMENT's failure to make findings therein and because of its denial of a post-suspension hearing. Plaintiff also sought vacatur based upon lack of jurisdiction and the deliberate fraud, misrepresentation, and other unethical practices of Defendant CASELLA, as to which Plaintiff requested an immediate disciplinary investigation.

135. Two days later, by motion dated June 18, 1992, Plaintiff moved to dismiss the April 9, 1992 Supplemental Petition , as well as the February 6, 1990 Petition which it incorporated, based on non-compliance with jurisdictional provisions of Judiciary Law §90 and 22 N.Y.C.R.R. §691.4(e)(4), §691.4(f), and (h) by Defendants SECOND DEPARTMENT, GRIEVANCE COMMITTEE, CASELLA, and SUMBER.

136. In conjunction therewith, Plaintiff sought disclosure pursuant to CPLR §408 so as to determine whether Defendant GRIEVANCE COMMITTEE was complying with rules regarding committee action and authorization "or whether, as is believed, the Committee functions more as a 'rubber stamp' for Mr. Casella."

137. Plaintiff further sought transfer to another Judicial Department based on Defendant SECOND DEPARTMENT's pattern of decisions, which she alleged to be "in disregard of fact and

law", "politically-motivated retaliation" and "invidious, selective, and discriminatory prosecution".

138. While Plaintiff's June 18, 1992 motion to dismiss the April 9, 1992 Supplemental Petition was sub judice, Defendant CASELLA, without leave of Court, served a new Notice of Supplemental Petition and Supplemental Petition, dated June 26, 1992. Said new Supplemental Petition was virtually identical to the previous one, except that it annexed a Verification thereafter made by Defendant SUMBER. Defendant CASELLA refused to withdraw his earlier Supplemental Petition.

139. On July 3, 1992, Plaintiff moved to strike the June 26, 1992 Supplemental Petition, for discovery, and for an "immediate disciplinary investigation of Petitioner's Chief Counsel for his persistent unethical and abusive practices".

140. Thereafter, Defendant CASELLA transmitted an ex parte letter dated July 8, 1992 to Defendant SECOND DEPARTMENT. Upon information and belief, said ex parte letter related to Defendant CASELLA's two sua sponte complaints on Wolstencroft and Fass. Prior thereto, Defendant GRIEVANCE COMMITTEE had never notified Plaintiff of any intent to take disciplinary steps and had never served her with pre-petition written charges or afforded her a pre-petition hearing, as 22 N.Y.C.R.R. §691.4(e)(4) and (f) require.

141. Plaintiff's "interim" suspension made the exigency exception under §691.4(e)(5) inapplicable.

142. At the time of said ex parte July 8, 1992 communication, Plaintiff had supplied Defendant CASELLA with written responses denying any wrong-doing by her and directing his attention to her two Article 78 proceedings against Justice Colabella, wherein she documented the unlawful nature of Justice Colabella's conduct and that his decisions knowingly falsified the facts concerning her.

143. By Order dated July 31, 1992, Defendant SECOND DEPARTMENT denied, without reasons and with imposition of "costs", Plaintiff's June 16,1992 motion to vacate the June 14, 1991 suspension order based on Russakoff. It also denied all other relief, including Plaintiff's request for leave to appeal to the Court of Appeals.

144. Thereafter, Plaintiff sought to appeal as of right to the

Court of Appeals based on Defendant SECOND DEPARTMENT's denial of her constitutional right to equal protection to that afforded to Mr. Russakoff, further arguing that interim suspension orders without hearings are unconstitutional.

145. Although Plaintiff demonstrated that her "interim" suspension was in all respects a fortiori to that in Russakoff, by Order dated November 18, 1991, the Court of Appeals dismissed, for lack of finality, Plaintiff's appeal as of right.

146. By three separate Orders dated November 12, 1992, Defendant SECOND DEPARTMENT: (a) sua sponte, amended its July 31, 1992 Order denying vacatur of the June 14, 1991 "interim" suspension Order to impose maximum statutory costs against Plaintiff for having made said motion; (b) authorized disciplinary proceedings based on Defendant GRIEVANCE COMMITTEE's ex parte July 8, 1992 report--as to which Plaintiff only then became aware; and (c) by "Decision and Order on Application", denied Plaintiff's motion for discovery and for investigation of Defendant CASELLA's unethical conduct and granted Defendant GRIEVANCE COMMITTEE leave "to resubmit the charges" of the June 26, 1992 Supplemental Petition, after granting Plaintiff's July 3, 1992 motion to strike same and to vacate the April 1, 1992 Order which had authorized it.

147. Thereafter, by letter dated December 4, 1992, Plaintiff communicated directly with Defendant SUMBER, protesting Defendant GRIEVANCE COMMITTEE's violation of her due process rights by failing to comply with the pre-petition requirements of §691.4 as to either the February 6, 1990 Petition or the charges in the June 26, 1992 Supplemental Petition and that she had never had any hearing as to her alleged "failure to comply", for which Defendant SECOND DEPARTMENT had purportedly suspended her nearly a year and a half earlier. Plaintiff further stated that, by virtue of her interim suspension, there could be no claim of exigency and threat to the public interest under §691.4(f). Said letter to Defendant Sumber was followed by several more on the subject requesting an immediate hearing on her "interim" suspension.

148. On December 14, 1992, Plaintiff moved to reargue and renew the November 12, 1992 aforesaid sua sponte Order, detailing that her right to vacatur of the interim suspension Order was in all respects a fortiori to Russakoff's.

149. By ex parte report dated December 17, 1992,

Defendant CASELLA communicated with Defendant SECOND DEPARTMENT. Upon information and belief, said communication purported to be the resubmission of the three charges of Defendant GRIEVANCE COMMITTEE's June 26, 1992 Supplemental Petition and the April 9, 1992 Supplemental Petition before it, authorized by Defendant SECOND DEPARTMENT's November 12, 1992 "Decision and Order on Application". Prior thereto, Defendant GRIEVANCE COMMITTEE had never served Plaintiff with pre-petition written charges or afforded her a pre-petition hearing, as 22 N.Y.C.R.R. §691.4(e)(4) and (f) require.

150. Plaintiff's "interim" suspension made the exigency exception under 22 N.Y.C.R.R. §691.4(e)(5) inapplicable.

151. On January 28, 1993, Defendant SUMBER signed a Petition, made entirely "upon information and belief", based on the ex parte November 12, 1992 Order authorizing Defendant GRIEVANCE COMMITTEE to commence a proceeding against Plaintiff based on acts allegedly set forth in Defendant GRIEVANCE COMMITTEE's ex parte July 8, 1992 report.

152. Defendant SECOND DEPARTMENT's November 12, 1992 Order failed to allege compliance by Defendant GRIEVANCE COMMITTEE with pre-petition jurisdictional requirements, set forth in 22 N.Y.C.R.R. §691.4(e)(4), (f), and (h) of notice, written charges, a hearing and findings based on evidentiary proof or that it was proceeding under the exigency provision of §691.4(e)(5).

153. The five charges comprising the January 28, 1993 Petition against Plaintiff were based entirely on Defendant GRIEVANCE COMMITTEE's own sua sponte complaints relating to the Wolstencroft and Fass matters before Justice Colabella.

154. Said January 28, 1993 Petition used the same docket number, A.D. #90-00315, as had been assigned to the completely separate and unrelated February 6, 1990 Petition.

155. Defendant GRIEVANCE COMMITTEE failed to personally deliver the January 28, 1993 Petition in accordance with Judiciary Law §90. Instead, Defendant GRIEVANCE COMMITTEE sent a process server disguised as a "pizza deliveryman", who, when informed that no pizza had been ordered by Plaintiff, returned the following day--a Saturday--and left the January 28, 1993 Petition stuck in the handle of the front door of Plaintiff's

home.

156. On February 22, 1993, Plaintiff moved to vacate the January 28, 1993 Petition based on lack of personal jurisdiction.

157. Upon information and belief, in late February 1993, Defendant SECOND DEPARTMENT communicated ex parte with Defendant GALFUNT, directing him to proceed with the February 6, 1990 Petition.

158. Immediately thereafter, Plaintiff sought to disqualify Defendant CASELLA from prosecution of the February 6, 1990 Petition based on her on-going complaints of prosecutorial misconduct by him and the fact that he would be an essential witness to her affirmative defenses. By letter dated March 15, 1993, Plaintiff put Defendant CASELLA on notice that he would be called upon to testify on the subject of the false claim in his January 25, 1991 Order to Show Cause for Plaintiff's suspension, to wit, that the February 6, 1990 Petition was "an underlying disciplinary proceeding" to his suspension application.

159. By Supplemental Affidavit, dated March 8, 1993, in further support of her December 14, 1993 motion to reargue and renew Defendant SECOND DEPARTMENT's November 12, 1993 sua sponte Order imposing maximum costs upon her for moving for vacatur based on Russakoff, Plaintiff documentarily showed, by comparison of her interim suspension order with those of 20 other attorneys interimly suspended by Defendant SECOND DEPARTMENT, that she had been treated in a disparate and discriminatory manner in that her suspension was unprecedented and that each of said attorneys had received a hearing, unless waived, and a final order for appellate review.

160. By "Decision & Order on Application" dated March 17, 1993, Defendant SECOND DEPARTMENT acted upon Defendant GRIEVANCE COMMITTEE's ex parte December 17, 1992 report--as to which Plaintiff had no knowledge--and authorized Defendant GRIEVANCE COMMITTEE to bring a proceeding based on "three additional allegations of professional misconduct set forth in the supplemental petition dated June 26, 1992".

161. Defendant SECOND DEPARTMENT's March 17, 1993 Order did not allege compliance by Defendant GRIEVANCE COMMITTEE with pre-petitions requirements, set forth in 22 N.Y.C.R.R. §691.4(e)(4), (f), and (h) of notice, written charges, a

hearing, and findings based on evidentiary proof or that it was proceeding under the exigency exception of §691.4(e)(5).

162. On March 30, 1993, Defendant GRIEVANCE COMMITTEE served the Supplemental Petition dated March 25, 1993, without complying with the personal delivery requirement of Judiciary Law § 90(6), instead, leaving such Supplemental Petition in the mailbox at Plaintiff's home.

162. Defendant GRIEVANCE COMMITTEE's March 25, 1993 Supplemental Petition, signed by Defendant SUMBER, failed to state that it was based on a committee report authorizing the charges set forth therein.

163. On April 8, 1993, in a telephone conference with Defendant REFEREE GALFUNT and Defendant CASELLA, who were then proceeding on the February 6, 1990 Petition, as directed by the Defendant SECOND DEPARTMENT, Defendant GALFUNT further stated that he would not rule on her jurisdictional objections to the February 6, 1990 Petition.

164. By motion dated April 14, 1993, Plaintiff moved for vacatur of the March 23, 1993 Supplemental Petition for lack of jurisdiction.

165. By Order dated April 22, 1993, Defendant SECOND DEPARTMENT denied, with maximum costs against her, Plaintiff's reargument/renewal motion of its November 12, 1992 sua sponte Order which imposed maximum costs upon her for moving for vacatur under Russakoff as "duplicative and frivolous". Said statement by Defendants MANGANO and SECOND DEPARTMENT was known to be false, since Plaintiff had never previously presented the facts set forth in her March 8, 1993 Supplemental Affidavit, relating to the "interim" suspensions of other attorneys by Defendant SECOND DEPARTMENT.

166. On April 28, 1993, following Defendant GALFUNT's continued refusal to rule on the jurisdictional objections to the February 6, 1990 Petition at the conference thereon, Plaintiff served an Article 78 proceeding addressed to that Petition entitled DORIS L. SASSOWER v. HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Depart., HON MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA as Chairman and Chief Counsel respectively of the Grievance Committee for the Ninth Judicial District, based upon the lack of

compliance with requisite jurisdictional pre-petition procedures under 22 N.Y.C.R.R. §691.4(e) and (f).

167. Plaintiff's aforesaid Article 78 Petition included transfer to another judicial department as part of its requested relief.

168. Thereafter, the Attorney General, on behalf of the above-named Respondents moved for dismissal. In such dismissal motion, the Attorney General conceded that the pre-petition requirements of 22 N.Y.C.R.R. §691.4 had not been complied with, but falsely argued that compliance was not required because the ex parte July 31, 1989 report, underlying the December 14, 1989 Order directing prosecution, "implicitly relied" upon the exigency exception under §691.4(e)(5).

169. The Assistant Attorney-General who made such dismissal motion did not purport that he had personal knowledge of Defendant GRIEVANCE COMMITTEE's ex parte July 31, 1989 report about which he was expressing his aforesaid factual allegations and belief and did not support his affirmation with any affidavit from his clients, who did have such personal knowledge. Nor did the Assistant Attorney General claim to be familiar with the two complaints encompassed by the February 6, 1990 Petition, purportedly based thereon.

170. The Assistant Attorney-General further opposed transfer and falsely asserted, without evidentiary support or affidavit by a party with personal knowledge, that Plaintiff's jurisdictional objections could be adequately addressed in the underlying proceeding.

171. On May 24, 1993, while Plaintiff's Article 78 proceeding against Defendant SECOND DEPARTMENT was pending against it, Defendant SECOND DEPARTMENT denied, in one motion and without reasons, Plaintiff's two separate motions to vacate the January 28, 1993 Petition and the March 17, 1993 Petitions for lack of personal jurisdiction.

172. By motion dated June 14, 1993, Plaintiff moved to reargue and renew said May 24, 1993 Order based, inter alia, upon Defendant SECOND DEPARTMENT's disregard for black-letter law relative to the controlling language of Judiciary Law §90(6) regarding personal service and upon "the appearance of impropriety"of Defendant SECOND DEPARTMENT's adjudicating Plaintiff's motion contesting personal jurisdiction while it was being

sued by her in her pending Article 78 proceeding.

173. By Order to Show Cause, dated July 2, 1993, Plaintiff cross-moved in her Article 78 proceeding for leave to amend or supplement her 78 Petition:

> "So as to plead a pattern and course of harassing and abusive conduct by Respondents, acting without and in excess of jurisdiction, as reflected by the March 25, 1993 Supplemental Petition and the January 28, 1993 Petition and all acts in prosecution thereof, as well as the May 8, 1990 and January 25, 19[9]1 motions made by Respondent Casella resulting in the interim Order of suspension dated June 14, 1991."

174. As part of that Cross-Motion, Plaintiff factually refuted and documented as false Assistant Attorney General Sullivan's claim that the ex parte July 31, 1989 report "implicitly relied" upon the exigency exception and sought discovery thereof, as well as of the ex parte July 8, 1992 report underlying the January 28, 1993 Petition and the ex parte December 17, 1992 report underlying the March 17, 1993 Supplemental Petition--both of which were rendered after Plaintiff was already suspended, thereby making unavailable any claim of "exigency" as to the latter two petitions.

175. Plaintiff further showed that Defendant SECOND DEPARTMENT and GALFUNT were refusing to address her jurisdictional challenge to the February 6, 1990 Petition. She annexed the full transcript of the April 1993 conferences before Defendant REFEREE GALFUNT and, specifically, referred to Defendant SECOND DEPARTMENT's prior denial, without reasons, of her jurisdictional challenge to the February 6, 1990 Petition, encompassed in her June 18, 1992 motion to dismiss.

176. Plaintiff's cross-motion detailed that all of Defendant SECOND DEPARTMENT's Orders under A.D. #90-00315, when compared to the record, "evidence a pattern of disregard for black-letter law and standards of adjudication--particularly as to threshold jurisdictional issues", with specific reference to those preceding the June 14, 1991 "interim" suspension Order and thereafter denying vacatur. The Attorney General did not deny same.

177. Plaintiff's Cross-Motion, which also sought summary

judgment, was unchallenged by the Attorney General, who did not deny Plaintiff's sworn statements as to the facts underlying Defendant SECOND DEPARTMENT's ex parte July 31, 1989 report.

178. The Attorney General, citing Judiciary Law §90(10), opposed any disclosure of the ex parte reports on which the February 6, 1990 Petition and other disciplinary petitions purported to rest. Without any legal authority, the Attorney General argued in opposition to transfer and contended that Presiding Justice Mangano was himself not disqualified from adjudicating Plaintiff's Article 78 proceeding, naming him as the first respondent.

179. On September 7, 1993, while Plaintiff's Article 78 proceeding was pending before Defendant SECOND DEPARTMENT, Plaintiff appeared at public hearings before the New York State Judiciary Committee in Albany and gave testimony as Director of the Ninth Judicial Committee, in opposition to Governor Cuomo's nomination to the Court of Appeals of Justice Howard Levine. Such opposition rested on Justice Levine's participation on the panel of the Appellate Division, Third Department, whose affirmance of dismissal in Castracan v. Colavita, contravened controlling law, the transcending public interest, and disregarded the factual record. In support thereof, Plaintiff provided the Senate Judiciary Committee with the full record in Castracan v. Colavita.

180. Plaintiff further testified that in a case where the legality and constitutionality of judicial cross-endorsements was the central issue, the Appellate Division, Third Department panel was obliged to disclose--but did not--that three of its five members had themselves been cross-endorsed when they ran for their judicial offices.

181. Plaintiff further argued that the Governor's nomination of Justice Levine by the Court of Appeals could properly be viewed by the public as a political "pay back" by Governor Cuomo for covering up the corrupt political Deal which Castracan v. Colavita challenged.

182. Two weeks later, Defendant SECOND DEPARTMENT, by Order dated September 20, 1993, granted the dismissal motion of its own attorney, the Attorney General, and dismissed the Article 78 Petition "on the merits", stating that "petitioner's jurisdictional challenge can be addressed in the

underlying disciplinary proceeding". Defendant SECOND DEPARTMENT knew such statement to be false.

183. Defendant SECOND DEPARTMENT further denied all relief requested by Plaintiff's Cross-Motion, notwithstanding her documented showing, by reference to the file under A.D. #90-00315, that Defendant SECOND DEPARTMENT was not an impartial tribunal and that the conduct being challenged by her was criminal in nature.

184. Defendant SECOND DEPARTMENT's dismissal of the Article 78 proceeding was by a five-judge panel, three of whom had participated in every Order under A.D. #90-00315, which Plaintiff's Article 78 proceeding had sought to have reviewed and an additional judge who had participated in more than half of the challenged Orders. Defendant MANGANO did not participate on the panel.

185. On the same day as it dismissed Plaintiff's Article 78 proceeding, Defendant SECOND DEPARTMENT, this time with Defendant MANGANO presiding, denied, without reasons, Plaintiff's June 14, 1993 motion for reargument/renewal of its May 24, 1993 Order for vacatur of the January 28, 1993 Petition and March 25, 1993 Supplemental Petition for lack of personal jurisdiction.

186. The following week, on September 27, 1993, Plaintiff was directed to proceed with three days of hearings on the February 6, 1990 Petition, in the absence of her attorney of record thereon, Eli Vigliano, Esq.

187. At said hearings, Defendant GALFUNT refused, contrary to Defendant SECOND DEPARTMENT's September 20, 1993 Order that Plaintiff could raise her jurisdictional objections to the February 6, 1990 Petition in "the underlying disciplinary proceeding", to permit her to do so, and allowed Defendant CASELLA to proceed on the February 6, 1990 Petition, without requiring him to first prove the jurisdictional allegations contained therein--which Plaintiff's March 8, 1990 Verified Answer had placed in issue. Defendant GALFUNT also refused to permit Plaintiff to prove that there was no jurisdiction.

188. At the aforesaid hearings on the February 6, 1990 Petition, Defendants GALFUNT and CASELLA refused to permit any proof by Plaintiff on the subject of her June 14, 1991 "interim" suspension and Defendant GALFUNT refused to require Defendant

CASELLA to give testimony as to his false statements to Defendants SECOND DEPARTMENT, GALFUNT, and the Court of Appeals that the February 6, 1990 Petition was "underlying" his application for Plaintiff's suspension.

189. On November 19, 1993, pursuant to Defendant SECOND DEPARTMENT's statement in its September 20, 1993 dismissal of her Article 78 Proceeding, Plaintiff moved "in the underlying disciplinary proceeding" for dismissal/summary judgment of the three disciplinary petitions against her, dated February 6, 1990, January 28, 1993, and March 25, 1993; for discovery of Defendant GRIEVANCE COMMITTEE's ex parte reports, dated July 31, 1989, July 8, 1992, and December 17, 1992; and for appointment of a special referee to investigate and report as to Plaintiff's complaints of prosecutorial and judicial misconduct in connection with all of the disciplinary proceedings against her.

190. Plaintiff's November 19, 1993 dismissal/summary judgment motion also sought transfer to another judicial department, documenting, by specific record references, that Defendant SECOND DEPARTMENT knew that the disciplinary proceedings it was authorizing against Plaintiff were jurisdictionally void, factually baseless, and resting on false and perjurious affirmations of Defendant CASELLA.

191. Defendant CASELLA failed to oppose Plaintiff's motion for summary judgment with any evidentiary support or probative affidavit, and failed to provide any legal authority in opposition to dismissal of the jurisdictionally-void disciplinary proceedings he had commenced against Plaintiff, without compliance with 22 N.Y.C.R.R. §691.4--even after Plaintiff was already suspended from the practice of law.

192. On December 15, 199[3], Plaintiff appeared in Albany at public hearings of the New York State Senate Judiciary Committee, and, as Director of the Center for Judicial Accountability, testified in opposition to Governor Cuomo's nomination of Justice Carmen Ciparick to the New York State Court of Appeals.

193. Plaintiff's aforesaid opposition was based, inter alia, on Justice Ciparick's inaction as a member of the New York State Commission on Judicial Conduct, to which she had been appointed by Governor Cuomo, in the face of documented complaints from Plaintiff and Mr. Vigliano as to the three-year Deal, the violations of

the Election Law at the judicial nominating conventions, the legally-aberrant decisions of the Third Department in Castracan v. Colavita, and of the Second Department in Sady v. Murphy, the fraudulent, pathological, and criminal conduct of Justice Fredman in the Breslaw case and the legally insupportable and retaliatory June 14, 1992 interim suspension Order of the Defendant SECOND DEPARTMENT.

194. As part of her opposition, Plaintiff challenged the completely secret process by which nominations to the Court of Appeals were made by the Governor as unconstitutional, as well as the Senate Judiciary Committee's failure to discharge its "advise and consent" function in anything more than a "rubber stamp" manner, based on deals made in advance by Senate leadership with the Governor.

195. On January 3, 1994, Plaintiff filed a Notice of Appeal to the Court of Appeals from the Defendant SECOND DEPARTMENT's Order and Judgment, dated September 20, 1993, dismissing her Article 78 proceeding, Sassower v. Hon. Guy Mangano, et al.

196. On January 9, 1994, Defendant KOPPELL was made personally aware of the dishonest and fraudulent manner in which the Attorney General's office had handled the Article 78 proceeding brought by Plaintiff, entitled, SASSOWER v. HON. GUY MANGANO, et al., including permitting their judicial clients to adjudicate the legality of their own conduct, which the Article 78 Petition asserted to be fraudulent and criminal.

197. On January 10, 1994, Defendant SECOND DEPARTMENT refused to grant a stay of further hearings on disciplinary proceedings on the February 6, 1990 Petition, pending the outcome of the Article 78 appeal and disposition of Plaintiff's November 19, 1993 dismissal/summary judgment motion. A further hearing then took place on the February 6, 1990 Petition before Referee Galfunt, which was adjourned sine die.

198. On January 24, 1994, Plaintiff filed her Jurisdictional Statement to the Court of Appeals in Sassower v. Mangano, et al., detailing fraudulent and criminal conduct by Defendant SECOND DEPARTMENT, the substantial constitutional issues based on the impropriety of Defendant SECOND DEPARTMENT reviewing the legality of its own conduct in an Article 78 proceeding against it, the

unconstitutionality of open-ended interim suspension orders and the disciplinary mechanism.

199. Plaintiff further argued, with citation to legal authority, in support of jurisdiction of the New York State Court of Appeals, that "In an Article 78 proceeding in which the Appellate Division has original jurisdiction...appeal lies to the Court of Appeals".

200. By letter dated February 3, 1994, Plaintiff filed a formal complaint with Defendant KOPPELL against his staff counsel for their fraudulent and unethical misrepresentations of fact and law before the Appellate Division, resulting in the September 20, 1993 Judgment of the SECOND DEPARTMENT dismissing Plaintiff's Article 78 proceeding. In support thereof and Plaintiff's allegations that Defendant KOPPELL's judicial clients were using their office "for ulterior and retaliatory purposes", Plaintiff requested "an independent examination of the files under A.D. #90-00315", waiving all confidentiality for said purpose.

201. The following day, Plaintiff received a copy of Defendant SECOND DEPARTMENT's Order dated January 28, 1994, denying, without reasons, her November 19, 1993 dismissal/summary judgment motion in the "underlying proceeding" and threatening Plaintiff with criminal contempt should she make further motions without prior judicial approval.

202. By letter dated February 6, 1994, Plaintiff notified Defendant ATTORNEY GENERAL KOPPELL that his judicial clients' January 28, 1994 Order further proved that there was no remedy "in the underlying disciplinary proceeding" and that the September 20, 1993 dismissal of her Article 78 Petition based thereon "was and is an outright lie". In support thereof, Plaintiff supplied Defendant KOPPELL with a full set of papers in the November 19, 1993 dismissal/summary judgment motion.

203. Nonetheless, by letter dated February 11, 1994, Defendant KOPPELL permitted his office to file with the Court of Appeals opposition to Plaintiff's Jurisdictional Statement, repeating the misrepresentations made to the Appellate Division--already documented by Plaintiff to be false and legally insupportable.

204. Thereafter, by letter dated February 22, 1994, Plaintiff apprised Defendant KOPPELL, that the Assistant Attorney General who had handled the matter before Defendant SECOND

DEPARTMENT and, thereafter, to the Court of Appeals, had admitted to her that he had never read the files under A.D. #90-00315.

205. Following Defendant KOPPELL failure and refusal to requisition the disciplinary files under A.D. #90-00315, Plaintiff supplied Defendant ATTORNEY GENERAL KOPPELL with a full set of papers, organized and indexed so as to substantiate Plaintiff's claim at ¶7 of her Jurisdictional Statement that all of Defendant SECOND DEPARTMENT's Orders under A.D. #90-00315 "in addition to being jurisdictionally void, are otherwise factually baseless, as the record under A.D. #90-00315 unequivocally shows".

206. On March 15, 1994 Plaintiff filed a letter with the Court of Appeals in further support of jurisdiction stating that Respondent SECOND DEPARTMENT was using its disciplinary power to retaliate against a judicial whistle-blower and that the confidentiality of Judiciary Law §90(10) was being employed against Plaintiff to disguise the lack of jurisdiction and "probable cause" for disciplinary proceedings it had continued to generate against her--even after her suspension.

207. Plaintiff's letter also brought to the attention of the New York State Court of Appeals the fact that Defendant KOPPELL was guilty of complicity with the criminal conduct of his clients. In support thereof, Plaintiff annexed her correspondence with Defendant KOPPELL to her letter.

208. Thereafter, despite written communications to Defendant KOPPELL, inquiring as to the status of his review of the files under A.D. #90-00315--hand-delivered to his office on March 8, 1994--Defendant KOPPELL failed and refused tor eview the files "in the underlying disciplinary proceeding" and failed and refused to retract his office's criminally false and fraudulent submission to the Court of Appeals.

209. By Decision, dated May 12, 1994, the Court of Appeals dismissed Plaintiff's appeal taken from the SECOND DEPARTMENT's dismissal of the Article 78 proceeding and denial of her Cross-Motion for lack of finality and upon the ground that no substantial constitutional question is directly involved." It made no comment as to any of the unethical conduct complained of by Plaintiff, including the lack of an impartial tribunal in the entity known as Defendant SECOND DEPARTMENT.

AS AND FOR A FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT

210. Plaintiff respectfully repeats, reiterates, and realleges all of the foregoing allegations, with the same full force and effect as if set forth verbatim hereinafter.

22 N.Y.C.R.R. §691.4(l)(1) and §691.2 Are Unconstitutional on Their Face, And As Applied

211. There is no statutory authority for "interim" suspension orders. This irrefutable fact was recognized in Matter of Nuey, 61 N.Y.2d 513, 474 N.Y.S.2d 714 (1984), wherein the New York State Court of Appeals explicitly recognized that Judiciary Law §90 does not provide a basis for "interim" suspensions.

212. The court rule authorizing "interim" suspensions, 22 N.Y.C.R.R. §691.4(l)(1), fails to identify the source of its authority.

213. Although Judiciary Law §90(2) confers exclusive disciplinary jurisdiction on the Appellate Divisions of the Supreme Court of the State of New York, such provision does not delegate any authority to them to make court rules as to disciplinary proceedings amounting to substantive law.

214. Defendant SECOND DEPARTMENT has stated that there is no public information available as to the rule-making procedures of the Court as to disciplinary matters.

215. The historical genesis of the Defendant SECOND DEPARTMENT's promulgation of its Rules is thus maintained as a wholly secret process, to which the public, including the very attorneys affected by their invocation, are told they have no right of access.

216. The "interim" suspension provisions of 22 N.Y.C.R.R. §691.4(l) and §691.13(b)(2) represent substantive law-making by the Appellate Divisions.

217. Under 22 N.Y.C.R.R. §691.2, interim suspension of an accused attorney based on an alleged "failure to comply" with a court order or demand of the grievance committee, as referred to in 22 N.Y.C.R.R. §691.4(l)(1), rests on an automatic, self-executing definition of professional misconduct anytime an attorney fails to so

comply, without consideration of the factual circumstances leading to such alleged "failure". This, therefore, embraces within it a "failure" which has a good faith predicate, a concept contrary to the federal and state constitutions and susceptible of its use for illegitimate purposes, as occurred in Plaintiff's case where the June 14, 1991 "interim" suspension Order (Exhibit "A") does not find that there was a "failure to comply", let alone that it was disobedient or in bad faith.

218. The record before Defendant SECOND DEPARTMENT shows that following its October 18, 1990 order, Plaintiff's counsel attempted to challenge it in a lawful and timely manner, consistent with the ethical duty of all attorneys to challenge an unlawful order or demand. That such challenge could, as here, be then as a basis for Defendant SECOND DEPARTMENT's June 14, 1991 "interim" suspension shows the need for federal judicial intervention to prevent the rights of citizens from being unconstitutionally infringed upon.

219. If Judiciary Law, §90, is construed as permitting interim suspension orders by the Appellate Divisions of the Supreme Court of the State of New York, notwithstanding the absence of any language authorizing such suspensions or any delegation of power with respect to same, the failure to provide a right of appeal from interim orders of suspension in Judiciary Law §90, comparable to that provided under Judiciary Law §90(8) in the case of final disciplinary orders under such statutory provision, which clearly and unequivocally states that attorneys "shall have the right to appeal to the court of appeals from a final order of any appellate division" or in the Appellate Division's court rules relating to interim suspensions must be declared unconstitutional as violative of such interimly suspended attorney's right to equal protection, as well as to due process.

220. There is no rational state purpose served in denying a right of appeal to interimly suspended attorneys, the consequences of whose interim suspension orders are no less profound, life-determining, irreparable and incalculable than those resulting from final orders to whom the Legislature has provided a statutory right of revie parties, without notice to the persons or attorneys affected thereby, without stating the reasons or circumstances under which such disclosure can be made.

225. The Legislature has thereby conferred a blanket authority in the courts, unregulated by standards of any kind, enabling the type of misuse of power presented by the instant case, where Plaintiff is denied access to information material and necessary to her defense.

226. It is essential to Plaintiff's rights and to the rights of all members of the bar that a declaratory judgment be entered declaring that the "interim" suspension order entered against her on June 14, 1991 be declared null and void, and that the Rules Governing the Conduct of Attorneys be declared unconstitutional, as set forth in particular in 22 N.Y.C.R.R. §691.2, §691.4(l)(1)(2), and §691.13(b).

227. The alleged "failure to comply", as referred to in 22 N.Y.C.R.R. §691.4(l)(1), is a standard too ambiguous, vague and insufficiently defined, to permit its use for any purposes, since, it can be readily used for illegitimate purposes as in Plaintiff's case, where her "interim" suspension based on an alleged "failure to comply" which was not stated to be in bad faith or disobedient, and consisted entirely of her counsel . ell-founded attempt to challenge the October 18, 1990 order as unlawful. Such motion, denied by the Court only two days before it issued the interim suspension Order, then became the basis for the "failure to comply". Under the Code of Professional Responsibility, an attorney has the ethical duty to challenge an unlawful order or demand. Such challenge cannot constitutionally then be used as a basis for suspension.

228. Defendant SECOND DEPARTMENT's disregard of the absence of required findings to support the false and deceitful allegation by Defendant CASELLA of "failure to comply" with Defendant SECOND DEPARTMENT's October 18, 1990 Order directing her medical examination, and of any statement in conformity with 22 Noss personally and professionally, including the closing of her practice of more than thirty-five years, all of which has been in violation of [Plaintiff's] constitutional rights and to retaliate against her for exercising her First Amendment rights. All such rights, as aforesaid, have been totally without redress in the state court system, where the very courts that have created the rules which are sought to be enforced by Plaintiff disregard and flout them.

234. Clearly, Plaintiff has no adequate remedy at law or in the New York court system because of judicial bias and the massive

cover-up that has taken place of the corrupt activities of powerful, politically-connected lawyers and judges, whose unethical and criminal conduct has gone wholly unpunished and uninvestigated by agencies charged with the duty of enforcing their obligations as public officers and officers of the Court.

AS AND FOR A SECOND CAUSE OF ACTION UNDER 42 U.S.C. §1983

235. Plaintiff repeats, reiterates, and realleges all of the factual allegations hereinabove set forth, with the same full force and effect as if more fully set forth hereinafter.

236. In the manner described herein, the defendants, acting under color of state law, wilfully and maliciously deprived Plaintiff of her constitutional rights.

237. In the manner described herein, the defendants acting under color of state law, acted with reckless disregard of Plaintiff's constitutional rights.

238. In the manner described herein, the defendants, acting under color of state law, deprived plaintiff of her First Amendment rights to freedom of speech, freedom to petition for redress of grievances, freedom from malicious prosecution, due process and equal protection of the law. All of these rights are secured to Plaintiff by the provisions of the First, Fifth, and Fourteenth Amendments to the United States Constitution and by Title 42 U.S.C. §1983 and §1988.

239. In the manner described above, the defendants acting under color of state law, deprived Plaintiff of her rights to be free from abuse of disciplinary process, malicious prosecution, and from the intentional infliction of emotional distress upon her. All of these rights are secured to the plaintiff by the provisions of New York law, which are invoked under the pendent jurisdiction of this Court.

240. The direct and proximate result of the acts and omissions of the Defendant SECOND DEPARTMENT in issuing the June 14, 1991 interim suspension Order was that Plaintiff was compelled to incur economic loss by the necessity of retaining the services of counsel to defend herself against such unlawful and jurisdictionally void Order, and to suffer great physical, mental and emotional pain, humiliation, embarrassment and anguish by reason

thereof, consequent to publication of such Order published, which was released to the media on direction of Defendant SECOND DEPARTMENT, to close up her professional practice of more than thirty-five years, and to do so literally "overnight" since the Order was effective "immediately".

241. As a direct and proximate result of Defendants' acts and omissions, and the aforesaid June 14, 1991 interim suspension order suspending Plaintiff from practice by the New York State Appellate Division, Plaintiff was caused to suffer an automatic suspension from practice in the federal courts to which she was also admitted. Such suspension order was also issued without a hearing, thereby causing Plaintiff to suffer further irreparable physical, mental, and emotional pain, suffering, humiliation, embarrassment, and incalculable economic loss.

242. As a direct and proximate result of Defendants' acts and omissions, and by reason of the June 14, 1991 interim suspension order, Plaintiff was further caused to suffer the loss of her real estate license, as well as her notary public license.

243. As a direct and proximate result of Defendants's acts and omissions and her aforesaid suspensions, Plaintiff was caused to suffer irreparable physical, mental, and emotional pain, suffering, humiliation, embarrassment and incalculable economic loss, to under go medical care and treatment by reason of the trauma the stigma caused to her name, reputation, and career, all to her continuing and incalculable economic loss, and impacting irreparably and permanently on her ability to enjoy life in a normal and customary manner.

244. As a direct and proximate result of the Defendants' acts and omissions alleged herein, Plaintiff was caused to incur severe and grievous physical, mental, and emotional pain, suffering, fright, anguish, shock, anxiety, sleeplessness, and traumatic, stress-related conditions.

245. As a direct and proximate result of Defendants' conduct, Plaintiff was caused to incur medical expense, and will continue to require medical care and treatment for the indefinite future.

AS AND FOR A THIRD CAUSE OF ACTION FOR CONSPIRACY UNDER 42 U.S.C. §1983

246. Plaintiff respectfully repeats, reiterates, and realleges each and every allegation set forth hereinabove, with the same full force and effect as if more fully set forth verbatim hereinafter.

247. Heretofore, and on or about July 31, 1989, the Defendants herein conspired together and maliciously and wilfully entered into a scheme to deprive Plaintiff of her constitutional rights and her professional license to practice law.

248. Thereafter and on or about July 31, 1989 and continuing up to the present date, the Defendants did those acts and failed to do those acts, in pursuance of said conspiracy as hereabove alleged, and all such acts and omissions were participated in and done by all of the Defendants or by one or more of them as according the plan of said conspiracy for the purpose of discrediting, defaming and destroying Plaintiff's name, reputation, career, and professional practice in order that she be silenced as a voice speaking out against judicial corruption by judges and lawyers in the Second Judicial Department of the Supreme Court of the State of New York.

249. By reason of the foregoing, Plaintiff was damaged as alleged hereinabove.

AS AND FOR A FOURTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

250. Plaintiff repeats, reiterates and realleges each and every allegation set forth hereinabove, as if more fully set forth verbatim hereinafter.

251. The acts and omissions of Defendants as hereinabove set forth were done wilfully, maliciously, outrageously, deliberately, and purposely with the intention to inflict emotional distress upon Plaintiff and/or were done in reckless disregard of the probability of causing Plaintiff emotional distress, and these acts did in fact result in severe and extreme emotional distress.

WHEREFORE, it is respectfully prayed that this Court grant a declaratory judgment declaring the June 14, 1991 Order suspending Plaintiff from the practice of law a legal nullity and such other and further equitable relief as may be just and proper; and by awarding

Plaintiff a judgment against the defendants and each of them, jointly and severally, as follows:

A. Compensatory damages in an amount the trier of fact shall consider to be just and fair to compensate Plaintiff for the injuries suffered by her and which she may, with reasonable certainty, continue to suffer in the future as a result of Defendants' wrongful conduct.

B. Punitive damages in an amount the trier of fact shall consider to be just and fair for Defendants' wilful and malicious violation of Plaintiff's constitutional rights, their intentional gross or reckless disregard thereof;

C. Attorney fees and all costs and expenses of this action;

D. Such other and further relief as this Court shall deem just and equitable to redress the constitutional torts and other wrongs done to Plaintiff as hereinabove set forth.

DORIS L. SASSOWER
s/
Plaintiff, Pro Se
DLS-7527
283 Soundview Avenue
White Plains, New York 10606
914-997-1677

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

DORIS L. SASSOWER, being duly sworn, states that I am the Plaintiff in the within action. I have read the within Verified Complaint dated June 20, 1994, and attest that the allegations therein stated are true and correct to my own personal knowledge, unless stated on information and belief, and as to such allegations, I believe them to be true and correct.

s/
DORIS L. SASSOWER

Sworn to before me this
14th day of October 1994.

Notary Public

Louise DiCrocco
Notary Public State of New York
No. 4718571
Qualified in Westchester County
Commission Expires 12-10-94

EXHIBIT "A" TO VERIFIED COMPLAINT: DEFENDANT SECOND DEPARTMENT'S JUNE 14, 1991 "INTERIM" SUSPENSION ORDER, PURSUANT TO 22 NYCRR §691.4(l)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7404T
B/kr

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER
ON MOTION

In the Matter of Doris L. Sassower,
an attorney and counselor at law.

Grievance Committee for the Ninth Judicial
District, petitioner;

Doris L. Sassower, respondent.

By decision and order of this court dated October 18, 1990, the petitioner's motion to suspend the respondent from the practice of law for an indefinite period and until the further order of this court based upon respondent's incapacity and for an order directing that the respondent be examined by a qualified medical expert to determine whether the respondent is incapacitated from continuing to practice law was granted to the extent that the respondent was directed to be examined by a qualified medical expert, to be arranged for by Chief Counsel for the Grievance Committee for the Ninth Judicial District, to determine whether the respondent is incapacitated from continuing to practice law pursuant to §691.13(b)(1) of the Rules of this Court [22 NYCRR §691.13(b)(1)], and the motion to suspend the respondent from the practice of law was held in abeyance

pending the receipt and consideration of the report of the medical expert.

The petitioner now moves to suspend the respondent from the practice of law for an indefinite period and until further order of this court based upon the respondent's failure to comply with the October 18, 1990 order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the respondent, Doris L. Sassower, pursuant to Section 691.4(l) of the Rules Governing the Conduct of Attorneys (22 NYCRR 691.4[l]) is immediately suspended from the practice of law in the State of New York, until the further order of this court; and it is further,

ORDERED that Doris L. Sassower shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant Judiciary Law §90, during the period of suspension and until the further order of this court, the respondent, Doris L. Sassower, is commanded to desist and refrain (1) from practicing law in any form, either as principal or as agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding herself out in any way as an attorney and counselor-at-law.

MANGANO, P.J., THOMPSON, BRACKEN, KUNZEMAN and SULLIVAN, JJ. concur.

ENTER: Martin B. Brownstein
Clerk

June 14, 1991

EXHIBIT "B" TO VERIFIED COMPLAINT: THE THREE-YEAR, CROSS-ENDORSEMENT, JUDGE-TRADING DEAL CHALLENGED BY PETITIONER IN THE ELECTION LAW CASE, *CASTRACAN v. COLAVITA, et al.*

In furtherance of a mutual interest to promote a non-partisan judiciary populated by lawyers of universally acclaimed litigation skills, unblemished reputations for character and judicial temperament and distinguished civic careers, and to enable sitting judges of universally acclaimed merit to attain re-election to their judicial office without the need to participate in a partisan contest, the Westchester County (Republican) (Democratic) Committee joins with the Westchester (Republican) (Democratic) Committee to Resolve:

That for the General Election of 1989, we hereby pledge our support, endorse and nominate Supreme Court Justice Joseph Jiudice, Supreme Court Justice Samuel G. Fredman and Albert J. Emanuelli, Esq. of White Plains, New York for election to the Supreme Court of the State of New York, Ninth Judicial District, and to call upon and obtain from our counterparts in Rockland, Orange, Dutchess and Putnam Counties similar resolutions; and

For the general election of 1990, assuming that the then Justice Albert J. Emanuelli will resign from the Supreme Court Bench to run for Surrogate of Westchester County and thereby create a vacancy in the Supreme Court, Ninth Judicial District to be filled in the 1990 general election, we hereby pledge our support, endorse and nominate County Court Judge Francis A. Nicolai as a candidate for the Supreme Court vacancy created by Judge Emanuelli's resignation, and to call upon and obtain from our counterparts in Rockland, Orange, Dutchess and Putnam counties resolutions and commitments to support Judge Francis A. Nicolai as their candidate to fill the vacancy created by the resignation of Judge Emanuelli; and we hereby pledge our support, endorse and nominate Albert J. Emanuelli as our candidate for Westchester County Surrogate in the 1990 general election.

For the general election of 1991, we hereby pledge our support, endorse and nominate Judge J. Emmet Murphy,

Administrative Judge of the City Court of Yonkers, for election to the County Court of Westchester County to fill the vacancy anticipated to be created by the election of Judge Francis A. Nicolai to the Supreme Court and Judge Adrienne Hofmann Scancarelli, Administrative Judge of the Family Court, Westchester County, for re-election to the Family Court, and Westchester County; and

To require each of the above-named persons to pledge that, once nominated for the stated judicial office by both of the major political parties, he or she will refrain from partisan political endorsements during the ensuing election campaign and, thereafter, will provide equal access and consideration, if any, to the recommendations of the leaders of each major political party in connection with proposed judicial appointments.

We are resolved and agreed that the foregoing resolution and pledges are intended to and shall be binding upon the respective Committees of the two major political parties during the years 1989, 1990 and 1991 and shall not be affected by any action or proposed action or court merger or court unification.

PETITIONER'S OPPOSITION TO DEFENDANTS' DISMISSAL MOTION, APPLICATION FOR SANCTIONS AGAINST THEM, AND FOR SUMMARY JUDGMENT IN HER FAVOR, filed June 26, 1995 in the District Court.

PETITIONER'S MEMORANDUM OF LAW, dated June 23, 1995

[R-470] **POINT II**

THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION

Defendants' Point II contention that the Eleventh Amendment bars Plaintiff's action is exposed as frivolous by Will v. Michigan Department of State Police, 491 U.S. 58 (1989), which Defendants twice cite (Br. 9, 17). Such case acknowledges the well-settled law that even in their official capacity, state judicial and prosecutorial officials are subject to injunctive and declaratory relief:

> ...a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' Kentucky v. Graham, 473 U.S. 159, at 167, n. 14...; Ex parte Young, 209 U.S. 123, 159-160...454...."

Will, supra, 70, fn. 10. See also, Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972).

In this action, the individual justices of the Appellate Division, Second Department, the members of the Grievance Committee for the Ninth Judicial District", its [now **[R-471]** former] Chairman, its Chief Counsel, the special referee, and the [now former] Attorney General are each sued in their "official and personal capacities".

Consequently, and as so alleged at ¶8 of Complaint, the Eleventh Amendment does not bar Plaintiff's right to injunctive relief-

-request for which is acknowledged by Defendants (Br. 2, 5). Moreover, an award of attorneys fees is not barred under the Eleventh Amendment. Pulliam v. Allen, 104 S.Ct. 1970 (1984).

As to compensatory and punitive damages, Farid v. Smith, 850 F.2d 917, 921 (2nd Cir. 1988), cited by Defendants (Point II, p. 9), makes clear their liability:

> "The eleventh amendment bars recovery against an employee who is sued in his official capacity, but does not protect him from personal liability if he is sued in his 'individual' or 'personal' capacity. [Kentucky v.] Graham, 473 U.S. at 166-67, 105 S.Ct. at 33105-06."

See, also Cohen v. Bane, 853 F.Supp. 620 (E.D.N.Y. 1994), cited by Defendants (Br. 19), citing Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974). Most recently, in Hafer v. Melo, 502 U.S. 21, 30-31 (1991), the Court stated:

> "...the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under §1983."

Consequently, and as so alleged at ¶9 of the Complaint, Defendants can be held personally liable for monetary damages for their bad-faith and intentionally harassing conduct.

POINT III

THIS COURT HAS SUBJECT MATTER JURISDICTION OF THIS ACTION, WHICH IS NOT BARRED BY ROOKER-FELDMAN OR COLLATERAL ESTOPPEL

[R-472] In urging that the Rooker-Feldman Doctrine and collateral estoppel bar this action (Br. Pts III and VI), Defendants have deliberately withheld from the Court the well-settled law that such defenses are inapplicable where, as here, there are allegations that the state court proceedings were biased and did not comport with due process. Thus, in Rooker v. Fidelity Trust Co., 263 U.S. at

413, 415 (1923), the Supreme Court upheld the dismissal of the lower court, stating:

> "It affirmatively appears that the circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs";

In Allen v. McCurry, 449 U.S. 90, 95 (1980), also relied on by Defendants, our highest Court expressly articulated the bedrock guide to any purported invocation of an estoppel bar:

> "But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case",

quoted also in Haring v Prosise, 462 U.S. 306, 313 (1983). See, also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir 1985), vacated on other grounds, 91 L.Ed.2d 56, cited with approval by Stone v. Williams, 766 F.Supp. 158, 162 (S.D.N.Y. 1991), aff'd., 970 F.2d 1043 (1992), cert. denied, 124 L.Ed.2d 243:

> "However, Rooker made clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbiter, were those that 'actually arose in the cause' in which a full hearing was held and where the judgment was responsive to the issues. **[R-473]** 265 U.S. at 415. Otherwise, if Rooker were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, Rooker would swallow 'the full and fair opportunity to litigate' limitation to res judicata clearly established elsewhere by the Supreme Court...", at 1472.

At bar, the state proceedings did not result in any adjudication on the merits. No "full hearing was had" and the orders

affirmed were in no way "responsive to the issues". Plainly, the state litigation was not "adequate in relation to the Constitution's Due Process Clause." Kremer v. Chemical Construction Corp., 456 U.S. 461, 482 (1982). Such adequacy is particularly compelled in the area of attorney discipline, which the Supreme Court has held to be "adversary proceedings of a quasi-criminal nature". In Re Ruffalo, 390 U.S. 544, 550 (1968). An attorney is entitled to an opportunity to be heard, including confrontation and cross-examination of "those whose word deprives [the] person of his livelihood", Willner v. Committee on Character and Fitness, 373 U.S. 96 at 104-105 (1963), a most valued property and liberty right.

The most fundamental component of due process is "a fair trial in a fair tribunal", Withrow v. Larkin, 421 U.S. 35, 46 (1975), citing In re Murchison, 349 U.S. 133, 136 (1955); Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

The gravamen of the Complaint, clearly and unmistakably stated in innumerable specific factual allegations, is the absolute and complete denial of Plaintiff's due process rights, beginning with the absence of a fair and impartial **[R-474]** tribunal in the first instance (¶¶5-7, 62, 71-72, 137, 172, 190) and culminating in the ultimate travesty of judicial disqualification: the refusal of the judicial Defendants to recuse themselves from Plaintiff's Article 78 proceeding against them (¶¶166-7, 170, 172, 176, 178, 184*, 198, 209).

Defendants' bias is, as alleged in the Complaint, manifested in the total absence of facts or law to support the June 14, 1991 petition-less, finding-less "interim" suspension of Plaintiff's license, the barrage of "bogus" disciplinary prosecutions commenced against her, and the September 20, 1993 order dismissing her Article 78 proceeding (¶¶205, 182-3)--all of which the Complaint alleges to be the product of "fraud and collusion" on the part of the Defendants (¶¶3, 134, 189-90, 196, 182, 188, 200, 205, 208).

The specific pleaded allegations of "official lawlessness" by Defendants make it sanctionable for them to raise Rooker-Feldman and collateral estoppel defenses as a basis for a motion for judgment on the pleadings. Fraud alone pierces a collateral estoppel defense, Cornell v. Williams, 20 Wall 250 (1874), cited in Windsor v. McVeigh, 93 U.S. 274, 283 (1876).

Contrary to Defendants' presentation, the jurisdiction of this

Court is not being invoked to correct the state court's orders for errors of law or fact, but to vacate such fraudulent orders as unconstitutional because the judicial and other Defendants have, individually and in concert, knowingly and deliberately abandoned our most basic constitutional standards to **[R-475]** such a degree that there is no jurisdiction at all, resulting in a succession of absolutely void orders.

In both Rooker and Feldman, our highest Court did not find that the orders in question were void for lack of due process or that they had to be vacated as jurisdictional nullities. On the contrary, in both cases, the Supreme Court, by its affirmances, recognized that there was jurisdiction in the lower courts. Similarly, in Tang v. Appellate Division of New York Supreme Court, First Department, 487 F.2d 138, 143 (2d Cir. 1973), cited twice by Defendants (Br. 10, 11), this Circuit's affirmance of the district court's dismissal of a §1983 claim followed its review of the proceedings of the case, wherein it concluded: "There is no question but that the state court had jurisdiction of the person and subject matter here involved."

By contrast, in the case at bar, as the Complaint alleges, the judicial Defendants had neither personal nor subject matter jurisdiction when they issued the June 14, 1991 "interim" suspension order, and there has never been any state court adjudication responsive to those issues. Indeed, there is no "finding" of jurisdiction. Likewise, as to the dismissal of Plaintiff's Article 78 proceeding, the judicial Defendants were without subject matter jurisdiction to render the September 20, 1993 order of dismissal. Such order of dismissal is a nullity since, by the judicial Defendants' own decisional law, they were "without jurisdiction to grant the relief requested", Colin v. Appellate Division of Supreme Court, 159 N.Y.S.2d 99 (1957). **[R-476]** Against such pleaded facts and law, the Rooker-Feldman and collateral estoppel defenses are patently inapt.

POINT IV

THE ABSTENTION DOCTRINE IS INAPPLICABLE SINCE THE PLEADED FACTS BRING THIS CASE WITHIN THE EXCEPTIONS AND THE PREREQUISITES THERETO ARE WHOLLY ABSENT

Defendants' attempt to seek dismissal on grounds of abstention is deceitful and in bad faith. All Defendants' cited cases, when compared with the Complaint, show that the abstention doctrine is wholly inapplicable. The pleaded allegations not only state facts bringing this case squarely within "long-established" exceptions, Younger v. Harris, 401 U.S. 37, 50 (1971), but show that the "three prerequisites" for abstention, cited by Defendants, have not been met.

Indeed, in arguing the applicability of abstention to this action--which Defendants accomplish in three quick sentences (Br. 14)--they confine themselves to the "state court proceedings concerning the prosecution of three disciplinary petitions against plaintiff". They make no reference whatever to the June 14, 1991 "interim" suspension order, which, as shown by the allegations of the Complaint, is completely separate from and unrelated to those disciplinary proceedings. In such fashion they conceal the fundamental fact that there is no pending state court proceeding to which the suspension relates and that the "interim" suspension is free-standing.

Additionally undisclosed by Defendants is the fact that the three disciplinary petitions have themselves been **[R-477]** stayed by the judicial Defendants, sua sponte, and over Plaintiff's objections, until Plaintiff complies with the October 18, 1990 order[7]. Thus, the judicial Defendants have created a "stalemate", blocking prospective state adjudication of those separate and unrelated disciplinary proceedings. Additionally, and as alleged in the Complaint, Plaintiff has been totally precluded from raising her constitutional objections

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[7] See ¶79 of the Complaint delineating that the October 18, 1990 is "not a lawful order, being erroneous in at least seven material respects".

in those proceedings (¶¶187-191, 201-2).

As to the allegations of the Complaint bringing it within the "long-established" exceptions to the abstention doctrine, these specifically include: bias on the part of the state adjudicators (¶¶5-6, 62, 71-2, 98, 105, 137, 167, 190, 198, 208); bad-faith and Dombrowski-type harassment through multiple baseless disciplinary prosecutions (¶¶1, 3-7, fn. 2 herein); irreparable injury and loss: (¶¶7, 240-245, 248, 251); denial of opportunity to litigate the federal issues in state court (144-5, 198-9); and a flagrantly unconstitutional statutory scheme (¶¶211-234).

Relative to the "flagrantly and patently unconstitutional" statutory scheme, Defendants pretend that Plaintiff's challenge is no different than that "raised and rejected" in Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975) and Maddox v. Mollen. However, neither those cases, nor any others relied on by Defendants, involved an "interim" suspension **[R-478]** of an attorney's license, which, as pointed out by the Complaint (¶211, 219-220), is not even statutorily authorized[8]. As discussed in Plaintiff's Cert Petition (pp. 16-8, 28), the court rule §691.4(l) under which Plaintiff was suspended is on its face unconstitutional.

Indeed, Defendants' cited cases did not involve any professional discipline imposed without any hearing or findings--as at bar--or a constitutional challenge to court-created disciplinary rules, unsupported by a statute (¶¶211-217).

An analysis of Mildner and its lack of precedential value in resolving the issues raised herein as to the unconstitutionality of New York's attorney disciplinary scheme, which the powerful dissenting opinion of Judge Jack Weinstein makes clear, is set forth in Plaintiff's Cert Petition (at pp. 13-15, 18-21, 28). Such Cert Petition, together with Plaintiff's Reply Memorandum and all the cases cited therein, are incorporated herein by reference.

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[8] Cf. Herz v. Degnan, supra, fn.6, where the Third Circuit Appeals Court rejected, with rebuke, an Attorney-General's attempt to cause the revocation of a professional license in a manner, as in the case at bar, "not in compliance with the governing statute, either substantively or procedurally", at 208.

POINT V

DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFF'S DAMAGE CLAIMS

The only immunity argued by Defendants is from damages, not from suit.

[A-479] A. DEFENDANTS HAVE NO ABSOLUTE JUDICIAL OR QUASI-JUDICIAL IMMUNITY:

All the cases cited by Defendants to support their absolute immunity defense acknowledge that such immunity protects judges only "from liability for damages for acts committed within their judicial jurisdiction" (emphasis added). This limitation appears in the very language quoted by Defendants from Pierson v. Ray, 386 U.S. 547, 554-5 (1967). Indeed, Defendants concede (Br. 16), citing Stump v. Sparkman, 435 U.S.349, 355-56 (1978), that there is no such immunity when a judge proceeds in the "clear absence of all jurisdiction".

Defendants' attempt to seek dismissal on grounds of absolute judicial immunity is, therefore, sanctionable since over and again, the Complaint alleges that the judicial Defendants acted "without any jurisdiction whatsoever" (¶3); "without jurisdiction and beyond the scope of its judicial function" (¶4); "in clear and complete absence of jurisdiction and outside its judicial function" (¶9). Such allegations are, thereafter, particularized to describe the judicial Defendants' jurisdiction-less June 14, 1991 "interim" order suspending Plaintiff's license, as well as the continuum of jurisdictionless, malicious disciplinary proceedings it authorized against her (See, citations at fn. 2 herein).

Consequently, in advancing their absolute judicial immunity defense, Defendants have resorted to flagrant falsification of the Complaint, disingenuously asserting:

[R-480] "There is no indication in the complaint that...defendants were proceeding in the clear absence of all jurisdiction. Accordingly, plaintiff's claim for damages against them is barred." (Br. 16).

The case at bar fits within the Stump v. Sparkman, supra, analysis as to the facts establishing a "clear absence of all jurisdiction". In Stump, the Supreme Court held that a judge who had approved a mother's ex parte petition to sterilize her minor daughter, without any notice to her, without a hearing, and without appointment of a guardian ad litem, had not acted in "clear absence of all jurisdiction" because he had general jurisdiction. The Court then stated (at 358) as follows:

> "But in our view, it is more significant that there is no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump...We agree with the District Court, it appearing that neither by statute nor by case law has the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization." (emphasis added)

By contrast with Stump, New York's appellate divisions are not courts of general jurisdiction and their original jurisdiction is extremely limited. "More significant", both New York's statutory and decisional law, as identified in Plaintiff's Complaint, proscribe the type of suspension of Plaintiff's license as here at bar.

New York's Judiciary Law §90(2) confers original jurisdiction over attorney discipline matters on the appellate divisions, giving them authority to disbar, suspend, or censure. As pointed out at ¶211 of the Complaint, there is no statutory **[R-481]** authority for an interim suspension order, a fact expressly recognized by New York's highest court in Matter of Nuey, 61 N.Y.2d 513 (1984):

> "...the Appellate Divisions...have no authority under subdivision 2 of section 90 of the Judiciary Law to issue an order which purports to suspend an attorney pending determination of charges under consideration before a Departmental Disciplinary Committee."

As the Court of Appeals specifically ruled in Nuey, supra, 515, "a finding by the court that an attorney 'is guilty'...is a prerequisite to interference with the attorney's right to practice his or her profession" (¶94). Prior to such interference, Judiciary Law §90(6) requires that "a copy of the charges" must be personally served upon the attorney, who "must be allowed an opportunity of being heard in his own defense".

Such are the explicit prerequisites under New York law, without which the appellate division has no jurisdiction to remove or suspend an attorney from practice. Nevertheless, and, as alleged at ¶3 of the Complaint, when the judicial Defendants issued the June 14, 1991 "interim" suspension order, they did so "without notice of formal charges, without a hearing, without a finding of probable cause, or any other findings, administrative or judicial..."

These factual allegations, particularized throughout the Complaint, overcome any defense based on judicial immunity since they irrefutably demonstrate the "clear absence of all jurisdiction".

Additionally, and as pointed out by Justice Powell in **[R-482]** his dissenting opinion in Stump, supra, the rationale of the immunity doctrine as enunciated in the seminal case of Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1872), was that "the judicial system itself provided other means for protecting individual rights", at p. 1111. It was, therefore, Justice Powell's view that:

> "where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the Bradley doctrine is inoperative. See Pierson v. Ray, supra, 386 U.S., at 554, 87 S.Ct., at 1213, 1218.[9]

As reflected by the allegations of the Complaint (¶¶143, 178, 183-4, 203), the judicial Defendants have repeatedly denied Plaintiff's requests for leave to appeal and, when she sought Article 78 review of their jurisdiction-less conduct, refused to recuse

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[9] "In both Bradley and Pierson any errors committed by the judges involved were open to correction on appeal." [fn 2 of Justice Powell's dissent]

themselves and then, as respondents therein, opposed review by New York's Court of Appeals of their self-interested September 20, 1993 order in which they granted themselves dismissal of the Article 78 proceeding to which they were parties (¶¶166, 170, 176, 178, 182-4, 198-209).

As to the co-Defendants, other than Defendant Koppell, who seek to cloak themselves with the protection of the absolute judicial immunity, such defense fails. The allegations of the Complaint (¶¶67, 70, 74, 86, 104-5, 132-3, 136) contend that the Grievance Committee Defendants did not perform any adjudicative **[R-483]** function, but that Defendant Casella acted ultra vires and in their name, without the requisite adjudication by those Defendants to support prosecution by him. The absence of a petition supporting Defendant Casella's May 8, 1990 motion for a medical examination of Plaintiff (¶67), as well as his January 25, 1991 motion for Plaintiff's suspension for her alleged "failure to comply" with the October 18, 1990 order (¶86), highlights that there was no adjudication by them on which Defendant Casella's actions were predicated.

Moreover, these Defendants, as well as the Defendant Referee, by opposing and obstructing appellate review (¶¶108-110) and perverting independent review under Article 78 so as to prevent their jurisdictionless-conduct from being exposed (¶¶170, 178, 203), have further forfeited such defense.

Indeed, in the context of Plaintiff's Article 78 proceeding, there is no judicial immunity for the Defendants, who were therein sued as respondents and not acting in any judicial capacity (¶166). As respondents, they permitted their attorney, the Attorney General, to subvert the Article 78 mechanism and the judicial process in order to conceal their jurisdictionless and unconstitutional conduct (¶¶168-170, 173-178, 198-209).

B. DEFENDANTS HAVE NO QUALIFIED IMMUNITY:

As shown by Harlow v. Fitzgerald, 457 U.S. 800 (1982), twice cited by Defendants (Br. 18), it is well-settled that violations of "clearly-established" law preclude a qualified immunity defense. As the Harlow Court recognized, qualified **[R-484]** immunity protects only discretionary functions of officials, not their performance or non-performance of duties enjoined by law. This is shown by the full

quote from Harlow, only a portion of which Defendant has quoted:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.", Harlow, supra, at 818. (emphasis added).

Throughout her Complaint, Plaintiff alleges multitudinous specific violations by Defendants of "'clearly-established' statutory or constitutional rights" in connection with the June 14, 1991 "interim" suspension, the continuum of disciplinary proceedings commenced without compliance with due process prerequisites (¶¶40-42, 55-60, 149-155; 160-162), and the knowing and deliberate subversion of the Article 78 remedy by Defendants (¶¶168-170, 173-178, 183-4, 196, 198-200, 202-208).

The aforesaid misconduct involved no discretion on Defendants' part. The facts pleaded by the Complaint showed not only that the "interim" suspension order contravened clearly established case law of the state's highest court in Matter of Nuey, supra, (¶94), and, thereafter, and in Matter of Russakoff, supra, (¶134), both of which held that an interim suspension order without findings must be vacated, but that Plaintiff repeatedly brought such controlling law to the attention of Defendants (inter alia, ¶¶107, 134, 144, 147, 159, 190), who, nonetheless, maliciously and invidiously, perpetuated such **[R-485]** unlawful and unconstitutional order, further denying her a post-suspension hearing as to the basis for the suspension (¶¶4, 147, 159). Against such pleaded facts, establishing bad faith by Defendant Grievance Committee, as a matter of law, there could be no qualified immunity defense.

It is to escape the resultant liability for their official misconduct that Defendants, here again, resort to deliberate falsification and deceit in misrepresenting the content of the pleaded allegations of the Complaint, this time by claiming (Br. 18) that:

> "...plaintiff has not alleged, nor can she show, that defendants' alleged actions are inconsistent

with law or that defendants' conduct has, in any way, violated plaintiff's 'clearly established statutory or constitutional rights of which a reasonable person would have known.", citing Harlow v. Fitzgerald, at 818.

C. DEFENDANTS HAVE NO ABSOLUTE PROSECUTORIAL IMMUNITY

There is no absolute prosecutorial immunity for the Grievance Committee Defendants. A disciplinary prosecution not predicated on a petition setting forth the charges for which a disciplinary order is being sought is akin to a criminal prosecution of a felony not initiated by a grand jury indictment. Such act by a public prosecutor is plainly beyond his jurisdiction, outside the scope of his duties, and not within the purview of any immunity defense. Without the requisite instrument to bring on a prosecution, there is no "discretion" on the part of a prosecutor to indict or not to indict, to charge or not to charge. Thus, the case of Klapper v. Guria, 153 Misc. 2d **[R-486]** 726, 730 (N.Y. Co. 1992), cited by Defendants (Br. 17), is totally inapt, where there was "full compliance" by the Grievance Committee Defendants with "governing statutes and regulations in investigating and prosecuting the alleged acts of misconduct".

As to Defendant Oliver Koppell, the former Attorney General, the sole basis upon which Defendants seek to have claims against him dismissed is that he is protected by "absolute prosecutorial immunity" (Br. 18-19). Such defense is specious. None of the claims against Defendant Koppell rest on his prosecutorial function, but strictly on his role as counsel to Defendants when Plaintiff brought an Article 78 proceeding against them for their official misconduct under state law. This is expressly articulated at ¶¶10, 26-27, and particularized at ¶¶196, 200, 202-9 of the Complaint.

Unless the duties arise out of the prosecutorial function, the immunity defense does not apply. See, Mitchell v. Forsyth, 472 U.S. 511, 521 (1985) (holding that the Attorney General is absolutely immune from liability for performance of prosecutorial, but not his investigative duties).

PETITIONER'S RULE 3(G) STATEMENT, dated June 23, 1995 [R-454-459]

Plaintiff, as and for her Statement, pursuant to 3(g) of this Court's local rules, respectfully sets forth as follows:

1. As to all the material facts alleged in Plaintiff's Verified Complaint, there is no genuine issue of fact. All of Defendants' denials and denials of knowledge and information sufficient to form a belief as to the material allegations of Plaintiff's Complaint, as contained in their Answer, are sham and interposed to harass, prejudice and delay Plaintiff in enforcement of her federal constitutional rights hereunder and without any good faith belief in the truth of such denials. Such is set forth by Plaintiff's Affidavit, verified on June 23, 1995, and more particularly specified by the critique annexed thereto as Exhibit "D".

2. The material allegations of Plaintiff's Complaint are hereby repeated, realleged, and reiterated, with the same full force and effect, as if more particularly set forth herein, and are thereby made a part of this 3(g) Statement.

3. The evidentiary documentation in proof of the material allegations of Plaintiff's Complaint is all in Defendants' possession, custody, and control.

4. As to the June 14, 1991 "interim" suspension order and the October 18, 1990 order directing Plaintiff's medical examination, Plaintiff specifically alleges:

(a) Prior to the June 14, 1991 "interim" suspension order, Plaintiff was not served with any "Notice of Petition" or "Petition" setting forth any "Charges" based on her alleged "failure to comply with the October 18, 1990 order".

(b) Prior to the June 14, 1991 "interim" suspension order, Plaintiff was not afforded any hearing before the Grievance Committee or judicial Defendants, giving her an opportunity to be heard as to her alleged "failure to comply with the October 18, 1990 order", for which her suspension was allegedly being sought.

(c) Prior to the June 14, 1991 "interim" suspension order, Plaintiff denied Defendant Casella's claim that Plaintiff was guilty of any "failure to comply" with the October 18, 1990 order.

(d) Prior to the June 14, 1991 "interim" suspension order, by formal motion, Plaintiff challenged the October 18, 1990 order, as unlawful and without subject matter and personal jurisdiction.

(e) The June 14, 1991 "interim" suspension order made no findings and was not based on any findings by the Grievance Committee or judicial Defendants.

(f) Since issuance of the June 14, 1991 "interim" suspension order and for more than four years to date, Plaintiff has never been afforded a hearing as to the basis for her "interim" suspension, i.e., her alleged "failure to comply with the October 18, 1990 order".

(g) Prior to the October 18, 1990 order, Plaintiff was not served with any "Notice of Petition" or "Petition" setting forth "Charges" as to the basis upon which, pursuant to 22 NYCRR §691.13(b)(1), Defendant Casella was moving for her suspension, by motion dated May 8, 1990.

(h) Prior to the October 18, 1990 order, Plaintiff, by formal Cross-Motion, sought dismissal of Defendant Casella's May 8, 1990 motion to suspend her for alleged medical incapacity, pursuant to §691.13(b)(1), raising objections based on personal and subject matter jurisdiction, res judicata, collateral estoppel, invidious selectivity, and the Grievance Committee Defendants' "false, misleading, and deceptive presentation". Plaintiff specifically demanded "a pre-disciplinary hearing", particularly as to Defendant Grievance Committee's "continuing and unending pattern of invidious selectivity" and "malicious and retaliatory" harassment.

(i) Prior to the October 18, 1990 order, Plaintiff was not afforded any hearing before the Grievance Committee or judicial Defendants.

(j) The October 18, 1990 order made no findings and did not rest on any findings by the Grievance Committee Defendants.

(k) As alleged at ¶79 of the Complaint, the October 18, 1990 order:

(1) erroneously mischaracterized Plaintiff's Cross-Motion seeking dismissal of Defendant Casella's May 8, 1990 Order to Show Cause, as one seeking dismissal of a disciplinary proceeding authorized against her by a December 6, 1989 order;

(2) erroneously referred to a December 6, 1989

order as having authorized a disciplinary proceeding against Plaintiff, when in fact there was no December 6, 1989 order, but, rather, a December 14, 1989 order authorizing a separate and unrelated disciplinary proceeding.

(3) erroneously referred to Plaintiff's Cross-Motion as challenging personal jurisdiction in "the underlying disciplinary proceeding", when, in fact, Plaintiff's Cross-Motion challenged personal jurisdiction with respect to Defendant Casella's May 8, 1990 Motion;

(4) erroneously referred to an "underlying disciplinary proceeding", when, in fact, there was no "underlying disciplinary proceeding" to which Defendant Casella's May 8, 1990 Motion related;

(5) erroneously used the same docket number, A.D. #90-00315, for the October 18, 1990 order as had been assigned to the separate and unrelated February 6, 1990 petition, authorized by its December 14, 1989 order;

(6) erroneously delegated to Plaintiff's prosecutor, Defendant Casella, the court's authority to designate "qualified medical experts" pursuant to 22 NYCRR 691.13(b)(1);

(7) erroneously limited designation of "qualified medical experts" under 22 NYCRR §691.13(b)(1) to a single "qualified medical expert".

5. At the time of the October 18, 1990 and June 14, 1991 orders, Plaintiff was pro bono counsel in an Election Law case, challenging as unconstitutional and illegal, a 1989 political deal[10] between the two major parties for cross-endorsement of candidates for seven judgeships in the Second Judicial Department over a three-year period and the judicial nominating conventions that implemented such deal.

6. The effect of the June 14, 1991 "interim" suspension order was to remove Plaintiff as counsel from the Election Law case in which she was involved and to discredit her in her on-going activities as a leader and advocate of judicial reform.

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[10] The written deal is annexed as Exhibit "B" to Plaintiff's Complaint.

EXHIBIT "2A" TO PETITIONER'S AFFIDAVIT IN SUPPORT OF HER SUMMARY JUDGMENT APPLICATION, sworn to June 23, 1995 and filed in the District Court

Petition for a Writ of Certiorari (#94-1546) in Connection with Petitioner's State Court Challenge under N.Y. CPLR Article 78

[R-304] **QUESTIONS PRESENTED**

Whether New York's attorney disciplinary law is unconstitutional, as written and as applied:

1. where an attorney can be immediately, indefinitely, and unconditionally suspended from the practice of law by an interim order, without findings, reasons, notice of charges, a pre-suspension hearing, or a post-suspension hearing for nearly four years;

2. where a disciplined attorney has no absolute right of judicial review, either by direct appeal or by the codified common law writs;

3. Where adjudicative and prosecutorial functions are wholly under the control of the courts, enabling them to retaliate against attorneys who are judicial whistle-blowers;

4. where disciplinary proceedings: (a) do not comply with the court's own disciplinary rules; (b) are commenced by *ex parte* applications, without notice or opportunity to be heard; (c) deny the accused attorney all discovery rights, including access to the very documents on which the proceedings purport to be based; (d) do not rest on sworn complaints; (e) do not rest on an accusatory instrument or are asserted "on information and belief", not based on any probable cause finding of guilt.

[R-326] REASONS FOR GRANTING THE WRIT

The writ should be granted because the courts of New York have decided important questions of federal law in ways which conflict with applicable decisions of this Court on fundamental due process issues and, to the extent the federal law has not been settled, it ought to be settled by this Court.

The lead case raising the issue of the constitutionality of New York's attorney disciplinary statute is *Mildner v. Gulotta*, 405 F.Supp. 182, 191 (E.D.N.Y. 1975), aff'd, 425 U.S. 901 (1976). *Mildner* was a consolidation of three separate cases under 42 U.S.C. §1983 brought by three disciplined New York attorneys. All were challenging the constitutionality of Judiciary Law §90 [A-9] after the New York Court of Appeals denied them review.

[R-327] The majority of a three-judge District Court held that standards of federalism and comity required the federal court to abstain because the plaintiffs made no allegations of bias in the underlying disciplinary proceedings. Judge Jack Weinstein, in dissent, reached the merits and would have held Judiciary Law §90 unconstitutional in numerous respects, on due process, as well as on equal protection grounds.

This Court affirmed *Mildner*, without opinion, on the issue of abstention -- never reaching the transcendent issues as to the constitutionality of Judiciary Law §90. Yet, Justices Marshall and Powell apparently agreed with the view of concurring Judge Moore of the District Court that "the constitutional question is of sufficient importance to be resolved by our highest court..." (at 199). This Court's Memorandum Decision in *Mildner* shows that those two justices wished to "postpone consideration of the question of jurisdiction to a hearing of the case on the merits." 425 U.S.901 (1976).

The irreconcilable schism in the *Mildner* three-judge court as to the constitutionality of Judiciary Law §90 is a reflection of the differing understandings as to what this Court meant when, in *In re Ruffalo*, 390 U.S. 544, 551 (1968), it recognized attorney disciplinary proceedings as "quasi-criminal". Judge Neaher's majority opinion in *Mildner* conceded that the term was less than clear, referring to the designation as "cryptic", at 191. He then went on to cite (at 191-2) the Seventh Circuit as holding that disciplinary

proceedings are "in the nature of an inquest...not for the purpose of punishment." *In re Ming*, 469 F.2d 1352, 1353 (7th Cir. 1972). Starting from such perspective, it is not surprising that the two-judge majority arrived at a different conclusion from that of Judge Weinstein, who took the view expressed in *Erdman v. Stevens*, 458 F.2d 1205, 1209-10 (2d Cir) *cert. denied*, 401 U.S. 889 (1972), that "*a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding*...[I]t cannot be disputed that for most attorneys the license to practice law represents their **[R-328]** livelihood, loss of which may be a greater punishment than a monetary fine [citing cases of this Court]...Furthermore, disciplinary measures against an attorney...threaten another serious punishment -- loss of professional reputation. The stigma of such a loss can harm the lawyer in his community...". *Mildner*, at 210-211 (emphasis in the original). Consequently, Judge Weinstein believed that due process in the context of attorney disciplinary proceedings requires the full range of due process rights.

This divergence of understanding on such a pivotal issue as to what process is due an attorneys in "quasi-criminal" disciplinary proceeding has continued unabated in the two decades since *Mildner*, where the federal courts, in reviewing state disciplinary proceedings in civil rights actions, have not settled that issue or evolved standards that are consistent. *See* generally, Brewer, "*Due Process In Lawyer Disciplinary Cases: From the Cradle to the Grave,*" 42 South Carolina L.Rev. 925 (Summer 1991), and Hazard, "*A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*", 96 Yale L.J. 1060 (April 1987) and authorities cited therein. As shown by the shocking hearing transcripts appended hereto [A-64-86], the appointed Referee, as well as Chief Counsel to the Grievance Committee, do not recognize the authority of this Court in *In re Ruffalo*, *supra*, that disciplinary proceedings are "quasi-criminal", but regard them as civil matters [A-65-66].

The instant case is not an attack on the traditionally wide discretion afforded state courts in matters of attorney discipline, but rather the abuse of such discretion where it clearly impinges on the federally-protected due process rights recognized in the bedrock law of this Court. At issue here is the license of an attorney who was suspended [A-24] -- without notice of charges, a hearing, or findings

of guilt -- and who, for almost four years, has been denied a hearing as to the basis for her suspension, as well as any and all judicial review.

The paramount ethical duty of lawyers, as "guardians of the law," is to protect our legal system. ABA Code of Professional **[R-329]** Responsibility, as adopted by the New York State Bar Association, Canon 1 "Integrity of Profession" and Canon 8 "Improving the Legal System." [A-17]. The case at bar is one which would support the view that Petitioner was suspended to silence and discredit her public advocacy of reform of New York's judicial selection process and to put an end to the public interest litigation she was carrying forward, *pro bono*, to accomplish that purpose.

Meeting ethical obligations under the Canons must properly include criticism of the judiciary and the judicial selection process, when warranted. It does so on paper in New York, as reflected in the ethical considerations governing Canon 8 of the Code of Professional Responsibility [A-17]. Where -- as here -- the disciplinary machinery is used so unabashedly to retaliate against a lawyer who is a judicial "whistleblower" -- the message to the profession is one of intimidation. This is yet another important reason for granting the writ, so that a different message is sent to the profession, one consonant with the high standards of its ethical codes.

I. New York's Attorney Disciplinary Law Unconstitutionally Permits Interim Suspension Orders Without a Pre- or Post-Suspension Hearing.

It is well settled decisional law of this Court that minimum due process requirements of notice and opportunity for a hearing must be satisfied before an individual can be deprived of a license, governmental entitlement or benefit he possesses, *Bell v. Burson*, 402 U.S. 535, 539 (1971)(citing numerous cases). Only upon a compelling showing of emergency can a hearing be deferred and, in such cases this Court has held that a post-suspension hearing must be provided "without. appreciable delay." *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

In *Barry*, the Court held that a New York state agency rule permitting the summary suspension of horse trainers violated **[R-**

330] the Fourteenth Amendment because "it specifie[d] no time in which the hearing must be held, and it afford[ed] the [state regulatory] Board as long as thirty days after the conclusion of the hearing in which to issue a final order...." *Barry*, supra, at 60-61. By the standard of *Barry*, and this Court's other authorities, Respondent Second Department's interim suspension rule §691.4(l) [A-7-8] is, on its face, unconstitutional in that it does not require any hearing at all, either pre- or post-suspension. That §691.4(l) is also unconstitutional, as applied , is shown by the fact that under such rule provision, Petitioner was suspended from the practice of law without any hearing [A-24] and, for nearly four years, has been denied a hearing as to the basis for her suspension.

The facial infirmity of §691.4(l) was recognized by the New York Court of Appeals in *Matter of Russakoff*. 79 N.Y.2d 520, 583 N.Y.S.2d 949 (1992), where it cited *Barry*, *supra*, as well as *Gershenfeld v. Justices of the Supreme Court*, 641 F.Supp. 1419 (E.D. Pa 1986). *Gershenfeld* relied on *Barry* to hold that the interim suspension of an attorney is unconstitutional unless post-deprivation procedures assure "a prompt post-deprivation adversarial hearing."

However, the Court of Appeals, which vacated attorney Russakoff's interim suspension for lack of findings, did not invalidate §691.4(l) or the comparable interim suspension rules of the other three Appellate Divisions of the State, which its decision cited as defective. Rather, it only indicated that "[s]ome action to correct this omission seems warranted." (at 951).

To date, however, almost three years since the Court of Appeals decided *Russakoff* , Respondent Second Department has failed to correct its rules and, as to Petitioner, has repeatedly refused to take corrective action as to her specific suspension order [A-35, A-45, A-46, A- 47].

Such facts and constitutional issues of due process and equal protection were presented to the Court of Appeals both by a direct appeal in the underlying disciplinary proceeding subsequent to *Russakoff*, as well as twice in the subject Article 78 proceeding. Petitioner squarely presented the issue as to the **[R-331]** constitutionality of open-ended interim suspension orders. Indeed, in the Article 78 proceeding, Petitioner explicitly pointed out that there was not even statutory authority for interim suspension orders

-- a fact the Court of Appeals itself recognized in *Matter of Nuey*, 61 N.Y.2d 513, 515 (1984).

Consequently, the substantial constitutional issues here raised come before this Court because the Court of Appeals has failed and refused to strike down New York's court rules relating to the interim suspension of attorneys -- notwithstanding Petitioner four times presented her case to it [A-36, A-49, A-22, A-23]. That the Court of Appeals failed and refused to act where, additionally, Petitioner's interim suspension order is, on its face [A-24], devoid of the specific finding called for by the rule before it can be invoked to wit, "a finding that the attorney is guilty of professional misconduct immediately threatening the public interest" [A-7] makes manifest the need for this Court's review. The record starkly and unequivocally shows that the State of New York has deprived Petitioner not only of her due process rights under the Fourteenth Amendment, but her equal protection rights as well.

II. New York's Judiciary Law §90 is Unconstitutional in Failing to Provide Disciplined Attorneys a Right of Judicial Review, Either by Direct Appeal or by the Codified Common Law Writs.

This Court has long recognized that where due process has *not* been afforded by the tribunal of first instance, appellate review is an essential component of due process, *Mildner*, *supra*, dissenting opinion, at 223, citing numerous authorities of this Court.

The record in the case at bar shows that in the underlying disciplinary proceeding Petitioner was suspended under an interim order without any notice of charges and without any hearing, denying her the fundamentals of due process *ab initio*. Such **[R-332]** suspension -- as to which neither Respondent Second Department nor the Grievance Committee has made any findings -- is, additionally, "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause...." Cf. *Garner v. State of Louisiana*, 386 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) [A-37-44].

Consequently, appellate review is a due process right. However, Judiciary Law §90(8) provides no right of appeal from interim orders of suspension [A-9]. Such consequence flows from

the fact that interim suspension orders are not themselves statutorily authorized. *Matter of Nuey, supra,* 515.

Thus, Petitioner twice sought judicial review by direct appeal to the Court of Appeals, once by leave and once by right, only to be denied review each time [A-36, A-49]. At the time of the second denial, which the Court of Appeals explicitly stated was for "lack of finality" [A-49], her interim suspension order had then been in effect for 17 months.

Traditionally, where the remedy at law is inadequate, relief is obtainable by the common law writs to prevent or redress irreparable harm. Yet, New York's highest court here permitted, *sub silentio*, the destruction of the common law writs, codified in CPLR Article 78, which would otherwise have afforded Petitioner the judicial review unavailable in the direct appeal.

It did this by allowing to stand the Judgment of Respondent Second Department [A-20], wherein the very judges, whose orders were being challenged in the Article 78 proceeding, decided "the merits" of their own case. [cf. A-24, A-32, A-33, A-34, A-35, A-45, A-46, A-47, A-49, A-50, A-53, A-55, A-57, A-59, A-61, A-63]. Such adjudication not only subverted the historic purpose behind the writs, but violated one of the most basic tenets of due process, "that no man shall be judge of his own cause". *Spencer v. Lapsley*, 61 U.S. 264 (1858); *In re Murchison*, 349 U.S. 623 (1955; *Canon 3(C) of the Code of Judicial Conduct* [A16], *Canon* 3C, §103.3(c) of the *Rules Governing Judicial Conduct* [A-15], which is incorporated by reference into the New York State Constitution, and, additionally, **[R-333]** Judiciary Law §14 [A-11].

Because Judiciary Law §90(2) vests original jurisdiction of attorney disciplinary matters in the Appellate Divisions of its Supreme Court [A-9], the only higher tribunal in the State of New York is the Court of Appeals. The venue provisions pertinent to Article 78 [A-14, A-11], while recognizing that the writs run from higher to lower courts, do not specify the venue for such proceedings as against Appellate Division judges.

Under the New York State Constitution, the Court of Appeals has no original jurisdiction. At the same time, Supreme Court judges of the State of New York, sitting on its Appellate Division, are not expressly excluded by the Article 78 statute. Nor would there be any rational state purpose served by such exclusion,

particularly in disciplinary proceedings, where Appellate Division judges exercise original jurisdiction.

Indeed, in the case at bar, Respondent Second Department did not state that Article 78 relief was unavailable against Appellate Division judges, when it granted its own attorney's dismissal motion "on the merits." Such Judgment [A-20] flew in the face of its own precedent, recognizing that Article 78 can only be granted as against an inferior tribunal. *Colin v.. Appellate Division, First Department*, 3 A.D.2d 682, 159 N.Y.S.2d 99 (2nd Dept. 1957), citing *Smith v. Whitney*, 116 U.S. 167 (1986).

Neither in *Colin* nor *Matter of Capoccia*, 104 A.D.2d 536, 479 N.Y.S.2d 160 (3rd Dept. 1984), 480 N.Y.S.2d 160 (4th Dept. 1984) -- an Article 78 proceeding against Appellate Division judges arising out of a disciplinary proceeding -- did the three Appellate Divisions involved suggest that an Article 78 proceeding does not lie against Appellate Division judges.

The federal courts, both in *Mildner*, *supra*, and *Javits v. Stevens*, 382 F. Supp. 131, 140 (S.D.N.Y. 1974), on which *Mildner* relied, accepted unquestioningly that Article 78 was not available as a remedy to provide judicial review to disciplined lawyers. Neither of those courts discussed the significance of the unavailability of Article 78 review. Such would have required them to address the constitutionality of Judiciary Law §90 [A-9] **[R-334]** investing original jurisdiction over disciplinary proceedings in a lower court, which is not reviewable by the common law writs codified by Article 78.

It may well be inferred that the reason New York courts in *Colin*, *Capoccia*, and the case at bar have not openly declared that Article 78 relief does not lie against Appellate Division judges is because to do so would expose the unconstitutionality of Judiciary Law §90.

Moreover, in both *Mildner* and *Javits*, the courts -- notwithstanding the practical realities of the cases presented to them showing that the disciplined attorney petitioners therein were wholly deprived of any review of their constitutional due process claims[10] --

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[10] See particularly, the court's recitation in *Javits*, *supra*, at 134, of the exhaustive attempts by attorney Javits to obtain judicial review of his claims of

took the view that the limited review of final orders provided by Judiciary Law §90(8) [A-9] was not unconstitutional.

Consequently, neither of those courts was forced to confront the extraordinary issue herein presented -- which appears to be of first impression. Whether a state can constitutionally deny not only judicial review by direct appeal, but judicial review by the remedies available by the common law writs.

On this set of facts, where Judiciary Law 90(8) provides no statutory right of appeal from an interim suspension order and where New York courts have *sub silentio* nullified Petitioner's Article 78 remedy to obtain review by the common law writs, Judiciary Law §90 cannot be constitutionally permissible.

III. The Combination of Prosecutorial and Adjudicative Functions in New York's Disciplinary Scheme is Unconstitutional and Lends Itself to Retaliation Against Judicial Whistle-Blowers.

This Court has recognized that a combination of functions **[R-335]** in one individual or body is constitutionally suspect, *Withrow v. Larkin*, 421 U.S. 35 (1975); *see also,* e.g. *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164 (2d Cir. 1992); *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983); *In re DiMeo*, 697 F.2d 805, 807 (7th Cir. 1983) (noting that the combination of judicial and prosecutorial functions is "alien to traditional conceptions of the judiciary."

New York's disciplinary scheme is not merely suspect and "alien," but, as this case establishes, constitutionally intolerable. It is a sharp contrast to the typical civil-service protected administrative/adjudicative process, which was the basis of the Court's above-cited precedents.

In New York, the Appellate Divisions control all aspects of the prosecutorial and adjudicative functions. As reflected by §691.4 [A-4], the Second Department appoints the Chief Counsel of the Grievance Committee, who serves as an at-will salaried employee.

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constitutional violations -- all futile.

Respondent Second Department, likewise, appoints every member of the Grievance Committee, including its Chairman [A-5, A-67], who serve without compensation . It also appoints the Referee, whose compensation is paid per diem for his hearing of the disciplinary proceedings, his function being to "hear and report," not to determine. The Court is free to disregard his findings, *Mildner*, *supra*, at 190.

Where all persons participating in the investigatory, prosecutorial, and hearing functions are serving at Respondent Second Department's pleasure, with no security of continued tenure and prestige should their actions displease that court, there can be no true independence, in fact or in appearance.

In practice, the situation is far worse because the fundamental check of review by a Grievance Committee does not function in any real sense. The Committee is, in fact, a "rubber stamp" for the Appellate Division appointed Chief Counsel. This is dramatically reflected by the case at bar where the procedural prerequisites of §691.4(e)(4) [A-5] that have not been complied are those which establish committee action -- most obviously, the prescribed pre-petition hearing before the committee.

[R-336] The palpably aberrant and punitive suspension of Petitioner's license, the perpetuation of her suspension despite its patently unlawful character, and the array of disciplinary proceedings brought against Petitioner without compliance with due process prerequisites, are inexplicable except as the product of a retaliatory motivation. When a proceeding is fraught with procedural abuses, or is timed to prevent exercise of fundamental rights, such a motive may be inferred. *Lewellyn v. Raff*, 843 F.2d 1103, 1110 (8th Cir. 1988); *Herz v. Degnan*, 648 F.2d 201, 209-10 (3rd Cir. 1981).

In *Lewellyn*, state officials scheduled the plaintiff attorney's criminal trial 24 days before the election in which he was running. Their timing of the trial to interfere with the election established a motive to retaliate and discourage plaintiff's exercise of his rights under the First Amendment. In *Herz*, the state attorney general attempted to revoke plaintiff's license to practice psychiatry on grounds not stated in the governing statute, without notice, and without a hearing. The court found that the *ex parte* order in question strongly suggested "bad faith and harassment" and "official lawlessness" in violation of plaintiff's constitutional rights. 648 F.2d

at 208-210. The record in the instant case is replete with Respondents' repeated procedural violations. Moreover, the issuance of the October 18, 1990 Order [A-31], the day before the scheduled argument in the Appellate Division, Third Department of *Castracan v. Colavita* and the timing of a June 14, 1991 order of suspension [A-24], served upon Petitioner the day before the last date to file a Notice of Appeal with the Court of Appeals in *Castracan*, were calculated to, and did, interfere with her fundamental First Amendment rights.

Petitioner's public criticism of members of the state judiciary, her challenge to judicial selection practices in New York and her efforts to remedy abuses in the system through litigation constitute political speech of the most fundamental kind. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *C.B.S.* **[R-337]** *Inc. v. F.C.C.*, 453 U.S. 367, 396 (1981) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272). As this Court noted in *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), "speech concerning public affairs is more than self expression, it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *See also In re Primus*, 436 U.S. 412 (1978); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) (litigation is a form of political expression protected by the First Amendment).

Efforts to control attorneys' speech are subject to "exacting scrutiny", and "[o]nly upon the showing of a compelling interest may such a fundamental right be encroached upon." *Primus*, at 428, 432, 438 & n.32; *Button*, at 439. However, the state has no legitimate interest in initiating and prosecuting retaliatory proceedings, *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (the state "by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally-protected rights"); *Lewellyn v. Raff*, 843 F.2d 1103, 1110 (8th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *Phelps v. Hamilton*, 828 F. Supp. 831, 843 (D. Kan 1993); *Ruscavage v. Zuratt*, 821 F. Supp. 1078, 1082 (E.D. Pa. 1993). *Accord* ,*Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987) (it is

"'patently unconstitutional' to 'penalize those who choose to exercise' constitutional rights" (citing *United States v. Jackson*, 390 U.S. 570, 581 (1968); *Fitzgerald v. Peek*, 636 F.2d 943, 944-45 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981) (an action brought by state officials in bad faith in order to harass and punish the plaintiffs for criticizing officials violated the plaintiffs' First Amendment rights); *Dixon v. District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968) ("The government may not prosecute for the purpose of deterring people from their right to protest official misconduct."). As this Court long ago observed in *In re Garland*, 71 U.S. 333, **[R-338]** 379-80 (1866), while the state may prescribe qualifications for attorneys to engage in the practice of law, that power may not be exercised by the state "as a means for the infliction of punishment, against the prohibition of the Constitution." *Accord Primus*, *supra*, at 428, 432, 438; *N.A.A.C.P. v. Button*, *supra*, 415, 429-30, 439 ("a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"); *Johnson v. Avery*, 393 U.S. 483, 490, n. 11 (1969) ("the power of the states to control the practice of law cannot be exercised so as to abrogate federally protected rights"); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

IV. Judiciary Law §90 and the Related Rules of the Appellate Division, Second Department are Unconstitutionally Vague and Have Been Applied in an Unconstitutional Manner.

Judiciary Law §90 [A-9] confers no express rule-making authority on the Appellate Divisions relative to attorney disciplinary proceedings, other than that granted under subdivision 10 pertaining to confidentiality [A-10]]. Respondent Second Department has no published rules as to Judiciary Law §90(10). As to the disciplinary rules promulgated by Respondent Second Department as its Rules Governing the Conduct of Attorneys, 22 NYCRR Part 691, there is no rule-making history available to the public, including accused attorneys.

Even before *Ruffalo*, *supra*, this Court held, in a case construing Judiciary Law §90 in the context of bar admissions, that a state could not constitutionally deny an attorney admission based on *ex parte* committee reports. *Willner v. Committee on Character*

and Fitness, 373 U.S. 96, 102 (1963): "Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, '[t]he requirements of fairness are not exhausted in the taking or consideration of **[R-339]** evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.'" 105, citing *Morgan v. United States*, 304 U.S. 1, 20.

Yet, in the *a fortiori* case of an attorney already admitted to the bar, New York courts use *ex parte* committee reports, whose existence and content are unknown to the accused attorney, as a basis upon which to authorize the commencement of "quasi-criminal" disciplinary proceedings, depriving him of notice and opportunity to be heard at the outset.

As reflected by the record in both the disciplinary and Article 78 proceedings, Respondent Second Department abused the confidentiality provision of Judiciary Law §90(10) to deny Petitioner access to the *ex parte* committee reports underlying the prosecutions against her. This plainly conflicts with *Willner* and the authorities cited therein.

22 NYCRR §691.4(e)(4), (f), and (h) set forth the jurisdictional prerequisites which must be met for a grievance committee to recommend prosecution of an attorney [A-5]. Such prerequisites are protections that an attorney will not be subjected to prosecution without a "probable cause" finding based on an evidentiary hearing. However, §691.4(e)(5) [A-6] then vitiates these due process protections by permitting a grievance committee to dispense with them "where the public interest demands prompt action and where the available facts show probable cause for such action" [A-6]. Those two broadly-stated criteria are not defined whatsoever. Such provision provides the affected attorney with no notice or opportunity to be heard by the grievance committee so as to contest the applicability of that subdivision before the committee "forthwith recommends to the court the institution of a disciplinary proceeding."

In the case at bar, Respondent Second Department permitted the Grievance Committee to make its applications for authorization to commence three separate disciplinary proceedings against Petitioner, without any compliance with the pre-petition requirements of written charges, an evidentiary hearing, and **[R-340]**

findings of probable cause based thereon. In each proceeding, this was done entirely without notice to her or opportunity to be heard. The resulting orders [A-63, A-50, A-55, A-57], wholly *ex parte*, do not identify such fact. Nor do they identify the specific subdivision of §691.4 being invoked or set forth any findings -- either by Respondent Second Department or the Grievance Committee, pursuant to which the recommendation, if any, was made or authorization granted. None of the orders authorizing prosecution, in fact, alleged that authorization was pursuant to a recommendation of the Grievance Committee, based on a majority vote thereof, as explicitly required by §691.4(e) and (h) [A-5-6].

The three petitions thereafter served upon Petitioner, two after her suspension -- all set forth "on information and belief" -- similarly failed to plead the specific subdivision of §691.4 being invoked, and made no evidentiary showing permitting invocation of the exigency provision of §691.4(e)(5), so as to dispense with the due process prerequisites of §691.4(e)(4), (f), and (h). Indeed, as to the latter two petitions, §691.4(e)(5) was palpably inapplicable, Petitioner having already been suspended.

The issue of the failure of a disciplining court to follow its own disciplinary rules is discussed in *Matter of Thalheim*, 853 F.2d 383 (5th Cir. 1988). In *Thalheim*, the Circuit Court invalidated an attorney's suspension imposed in the absence of a recommendation by disciplinary panel, where such was required under the court's disciplinary rules, stating: "Attorney...suspension cases are quasi-criminal in character...Accordingly, the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged. Moreover, the same principle of construction follows from the fact that it was the court that drafted these rules. The court wrote its own rules; it must abide by them." Thalheim, at 388.

At every juncture, and most egregiously in connection with Petitioner's interim suspension, Respondent Second Department has ignored its own rules and, when challenged by Petitioner in legally and factually meritorious motions, has refused to account for its actions. Its continuum of summary **[R-341]** decisions, without findings or reasons, are reflective that it cannot legally or factually justify its orders. Indeed, although in the case of interim suspensions, the Second Department's own rules [A-8] require it to "briefly state its reasons", it did not do so when it suspended Petitioner, as

reflected by the face of its June 14, 1991 interim suspension order [A-24].

In addition to being statutorily unauthorized and omitting any requirement of a hearing, the interim suspension rule provision of §691.4(l) also contains no requirement of wilfulness or mala fides in connection with the act(s) constituting a basis for the interim suspension. The safeguards attaching to contempt, the traditional remedy for wilful failure to obey court orders, including an evidentiary hearing, with discovery and appellate rights, not to mention judicial review by appeal, or an Article 78 proceeding, if appropriate, are all wiped out.

Here, Petitioner was suspended for alleged failure to comply with an order [A-31] which she had lawfully challenged as unlawful, and was forthwith publicly suspended upon denial of her challenge [A-33], without opportunity to seek a stay pending appeal or to comply. The issues she raised on that challenge have never been resolved, most notably, the "petition" requirement for commencing a proceeding to determine incapacity under 691.13(b)(1) [A-8]. As shown by the October 18, 1990 order, this is the very rule provision upon which the Chief Counsel to the Grievance Committee relied when he sought Petitioner's suspension. Notwithstanding that such rule explicitly requires the designation of medical experts to be by the court, the October 18, 1990 order [A-31] instead granted to Petitioner's prosecutor the power to appoint a medical expert.

That the court issues peremptory orders, rather than rendering reasoned opinions , when issues as to interpretation are presented to it means that the rules are really a sham for whatever the court wishes to make of them. As Judge Weinstein noted in *Mildner*, such practice prevents development of the law and "undercuts both due process and constitutional values" (at 217)

From the foregoing, it is manifest that this Court's **[R-342]** authoritative voice needs to be heard on the subject of attorney disciplinary procedures so that, as sanguinely stated in *Spivack v Klein*, 385 U.S. 516 (1967) "lawyers also [can]enjoy first class citizenship."

DEFENDANT SECOND DEPARTMENT'S OCTOBER 18, 1990 ORDER, PURSUANT TO §691.13(b)(1), at A-31 of Petitioner's Petition for a Writ of Certiorari (#94-1546) [R-373-374]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

0597T
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER
ON MOTION

In the Matter of Doris L. Sassower,
an attorney and counselor at law.

Grievance Committee for the Ninth Judicial
District, petitioner;

Doris L. Sassower, respondent.

Motion by petitioner to suspend respondent from the practice of law for an indefinite period and until the further order of this court based upon respondent's incapacity and for an order directing that respondent be examined by a qualified medical expert to determine whether respondent is incapacitated from continuing to practice law pursuant to §691.13(b)(1) of the Rules of this Court [22 NYCRR §691.13(b)(1)].

Respondent cross-moves for an order dismissing the disciplinary proceeding authorized against respondent by order of this

court dated December 6, 1989 by reason, *inter alia*, of lack of personal jurisdiction.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the respondent is directed to be examined by a qualified medical expert, to be arranged for by Chief Counsel for the Grievance Committee for the Ninth Judicial District, to determine whether the Respondent is incapacitated from continuing to practice law pursuant to §691.13(b)(1) of the Rules of this Court [22 NYCRR §691.13(b)(1)]; and it is further,

ORDERED that respondent's motion to suspend respondent is held in abeyance, and upon receipt of and consideration of the report of the medical expert, the court will determine whether to suspend respondent from the practice of law based upon her incapacity; and it is further,

ORDERED that respondent's cross-motion to dismiss the underlying disciplinary proceeding based upon, *inter alia*, lack of personal jurisdiction is denied.

MANGANO, P.J., THOMPSON, BRACKEN, BROWN and SULLIVAN, JJ. concur.

ENTER:

Martin B. Brownstein
Clerk

October 18, 1990

Exhibit "J-1" to PETITIONER'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TRO, presented on September 28, 1995 to the District Judge

Order suspending Petitioner's Law License in the Southern District of New York [R-558]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In the Matter of
Doris L. Sassower
283 Soundview Avenue
White Plains, New York 10606

M-2-238
ORDER

Respondent

----------x

An order to Show Cause dated September 11, 1991 was served on respondent directing her to show cause why she should not be disciplined by this Court pursuant to General Rule 4(g). The reason for this was the fact that on June 14, 1991 the New York Appellate Division, Second Department, suspended the respondent for an indefinite period based upon her failure to comply with the Appellate Division's order directing her to be examined in order to determine whether respondent is incapacitated from continuing to practice law. On September 10, 1991, the New York Court of Appeals denied respondent's motion for leave to appeal.

The Court has received a submission from respondent which requests that no action be taken by this Court in order to permit the New York Court of Appeals to decide a case which the respondent alleges is factually related to her case. This request is denied. It s hereby directed that the respondent is suspended from the rolls of the members of the bar of this Court to run concurrently with the State suspension.

SO ORDERED. s/ Thomas P. Griesa
Chairman, Grievance Committee, S.D.N.Y.

Dated: New York, New York, February 27, 1992

Exhibit "J-4" to PETITIONER'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TRO, presented on September 28, 1995 to the District Judge [R-562]

Petitioner's December 11, 1991 letter to Judge Thomas P. Griesa, Chairman, Grievance Committee, Southern District of New York

December 11, 1991

...

Honorable Sir:

... it is my confident hope to bring myself within the exception provided under Rule 4 of the General Rules of this Court, in the case of a suspension order entered without due process, and where an injustice has clearly been done by the state court. Likewise, I would hope to be granted the evidentiary hearing I was never accorded by either the Grievance Committee of the Ninth Judicial District or the Appellate Division, Second Department, so that I can establish these facts to your satisfaction.

With your kind permission, I would like to demonstrate the shockingly improper procedure followed by the Grievance Committee of the Ninth Judicial District, "rubber-stamped" by the Appellate Division, Second Department. The frightening result of their procedural violations is a factually and legally unjustified state court suspension order -- in blatant disregard of the strict requirements of the Judiciary Law and the very rules of the Appellate Division, Second Department -- designed to safeguard attorneys, as well as the public.

In connection with my request, I am enclosing for your kind consideration a copy of my biographic listing as it appeared in Martindale-Hubbell's Law Directory in 1989. In my more than thirty-five years at the bar, I have always adhered to the highest standards of the profession. I have been so recognized in many ways, including by Martindale's highest rating of "AV" throughout all the many years that I have been in my own practice. I have also been

honored by election as a Fellow of the New York Bar Foundation and the American Bar Foundation -- an honor reserved for "less than one third of one per cent of the practicing bar in each state".

I do not practice in the federal courts as an attorney, nor is it my intention to do so. The suspension order does not involve any moral turpitude, and there is no possibility whatever of prejudice to anyone by the granting of this request.

My sincerest appreciation.

Most respectfully,
s/
DORIS L. Sassower

Enclosures (3)

PETITIONER'S MARTINDALE HUBBELL LAW DIRECTORY LISTING (1989 edition), annexed to her Exhibit "J-4" to her Order to Show Cause for a Preliminary Injunction and Order to Show Cause [R-564]

Martindale-Hubbell Law Directory
New York
One Hundred and Twentieth Annual Edition

DORIS L. SASSOWER, P.C.

...

DORIS L. SASSOWER, born New York, N.Y., September 25, 1932; admitted to bar, 1995, New York; 1961, U.S. Supreme Court, U.S. Court of Claims, U.S. Court of Military Appeals and U.S. Court of International Trade. *Education:* Brooklyn College (B.A. summa cum laude, 1954); New York University (J.D., cum laude, 1955). Phi Beta Kappa, Florence Allen Scholar. Law Assistant: U.S. Attorney's Office, Southern District of New York, 1954-1955; Chief Justice Arthur T. Vanderbilt, Supreme Court of New Jersey, 1956-1957. President, Phi Beta Kappa Alumnae of New York, 1970-71. President, New York Women's Bar Association, 1968-69. President, Lawyers' Group of Brooklyn College Alumni Association, 1963-65. Recipient: Distinguished Woman Award, Northwood Institute, Midland Michigan, 1976. Special Award "for outstanding achievements on behalf of women and children," National Organization for Women -- NYS, 1981; New York Women's Sports Association Award "as champion of equal rights," 1981. Distinguished Alumna Award, Brooklyn College, 1973. Named Outstanding Young Woman of America, State of New York, 1969. Nominated as candidate for New York Court of Appeals, 1972. Columnist: ("Feminism and the Law") and Member, Editorial Board, Woman' Life Magazine, 1981. Author: Book Review, *Separation Agreements and Marital Contracts*, Trial Magazine, October 1987; *Support Handbook*, ABA Journal, October, 1986; Anatomy of a Settlement Agreement Divorce Law Education Institute 1982 "Climax of a Custody Case," *Litigation*, Summer, 1982; "Finding a Divorce Lawyer you can Trust"," *Scarsdale Inquirer*, May 20, 1982. "Is This Any Way to Run An Election?" *American Bar Association Journal*, August, 1980; "The Disposable Parent: The Case for Joint

Custody," Trial Magazine, April, 1980. "Marriages in Turmoil: The Lawyer as Doctor," Journal of Psychiatry and Law, Fall, 1979. "Custody's Last Stand," Trial Magazine, September, 1979; "Sex Discrimination -- How to Know It When You See It," *American Bar Association Section of Individual Rights and Responsibilities Newsletter*, Summer, 1976; "Sex Discrimination and the Law," *NY Women's Week*, November 8, 1976; "Women, Power, and the Law," *American Bar Association Journal*, May, 1976; "The Chief Justice Wore a Red Dress," *Woman in the Year 2000*, Arbor House, 1974; "Women and the Judiciary: Undoing the Law of the Creator," *Judicature*, February, 1974; "Prostitution Review," *Juris Doctor*, February, 1974; "'No Fault' Divorce and Women's Property Rights," *New York State Bar Journal*, November, 1973; "Marital Bliss: Till Divorce Do Us Part," *Juris Doctor*, April, 1973; "Women's Rights in Higher Education," *Current*, November, 1972; "Women and the Law: The Unfinished Revolution," *Human Rights*, Fall, 1972; "Matrimonial Law Reform: Equal Property Rights for Women," *New York State Bar Journal*, October, 1972, "Judicial Selection Panels: An Exercise in Futility?", *New York Law Journal*, October 22, 1971; "Women in the Law: The Second Hundred Years," *American Bar Association Journal*, April, 1971; "The Role of Lawyers in Women's Liberation," *New York Law Journal*, December 30, 1970; "The Legal Rights of Professional Women," *Contemporary Education*, February, 1972; "Women and the Legal Profession," *Student Lawyer Journal*, November, 1970; "Women in the Professions," *Women's Role in Contemporary Society*, 1972; "The Legal Profession and Women's Rights,"*Rutgers Law Review*, Fall, 1970; "What's Wrong With Women Lawyers?", Trial Magazine, October-November, 1968. Address to: The National Conference of Bar Presidents, Congressional Record, Vol. 115, No. 24E 815-6, February 5, 1969; The New York Women's Bar Association, Congressional Record, Vol. 114, No. E5267-8, June 11, 1968. Director: New York University Law Alumni Association, 1974; International Institute of Women Studies, 1971; Institute on Women's Wrongs, 1973; Executive Woman, 1973. Co-organizer, National Conference of Professional and Academic Women, 1970. Founder and Special Consultant, Professional Women's Caucus, 1970 Trustee, Supreme Court Library, White Plains, by appointment of Governor Carey, 1977-1986 (Chair, 1983-1986). Elected Delegate, White House

Conference on Small Business, 1986. Member, Panel of Arbitrators, American Arbitration Association. *Member:* The Association of Trial Lawyers of America; The Association of the Bar of the City of New York; Westchester County, New York State (Member: Judicial Selection Committee: Legislative Committee, Family Law Section), Federal and American (ABA Chair, National Conference of Lawyers and Social Workers, 1973-1974; Member, Sections on: Family Law, Individual Rights and Responsibilities; Committee on Rights of Women, 1982; Litigation) Bar Associations; New York State Trial Lawyers Association; American Judicature Society; National Association of Women Lawyers (Official Observer to the U.N., 1969-1970); Consular Law Society; Roscoe Pound-American Trial Lawyers' Foundation; American Association for the International Commission of Jurists; Association of Feminist Consultants; Westchester Association of Women Business Owners; American Women's' Economic Development Corp.; Womens' Forum. Fellow: American Academy of Matrimonial Lawyers, New York Bar Foundation.

Exhibit "J-5" to PETITIONER'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TRO, presented on September 28, 1995 to the District Judge [R-568]

Petitioner's December 19, 1991 letter to Judge Thomas P. Griesa, Chairman, Grievance Committee, Southern District of New York

...

December 19, 1991

Honorable Sir:

...

Alternatively, I would ask that the matter be set down for a hearing based on the enclosed copy of my motion for leave to appeal to the Court of Appeals. Although the Court of Appeals denied such leave, my application fully reflects the fact that I was denied my constitutional rights and that I was entitled to an evidentiary hearing prior to suspension.

It may be noted that only recently the Court of Appeals indicated that it may reevaluate its standards for the type of "immediate suspension" I was subjected to because of the substantial question raised as to whether they conform to constitutional requirements (NYLJ 12/13/91 p. 1, cols. 3-5 "Challenge to Rules on Lawyer Suspensions"). I might note that my case is far stronger than the one presently under consideration by the Court. As my attorney's supporting Affirmation points out (at p. 21), the Appellate Division, Second Department, ignored the mandatory requirements of its own rules, which are clearly intended to protect attorneys from immediate suspension without the uncontroverted or admitted showing of serious misconduct required under Padilla, 67 N.Y.2d at 448. Neither of those prerequisite facts existed in my case.

The extension herein requested would permit time for a decision by the Court of Appeals on the matter presently before it which might permit me to seek relief based thereon by way of renewal.

Your kind consideration is much appreciated.

Most respectfully,

Enclosures (2)

s/DORIS L. SASSOWER

Exhibit "J-6" to PETITIONER'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TRO, presented on September 28, 1995 to the District Judge [R-570]

Petitioner's January 17, 1992 letter to Judge Thomas P. Griesa, Chairman, Grievance Committee, Southern District of New York

January 17, 1992

...

Dear Judge Griesa:

In compliance with your letter dated December 20, 1991, I enclose a clipping from the New York Law Journal of January 15, 1992, showing that the New York State Court of Appeals has just granted leave to appeal in the Russakoff case, to which I referred in my December 19, 1991 letter. That Court also granted a permanent stay to Mr. Russakoff's immediate suspension pending his appeal.

The legal issues involved in that case are identical to mine. The Court of Appeals decision on Mr. Russakoff's upcoming appeal will necessarily address the same contentions made on my leave application and, therefore, will be an important precedent -- possibly entitling me to a vacatur of my suspension as a matter of law. Indeed, unlike Mr. Russakoff's situation, my case is by far the more compelling. There is no moral turpitude involved in the charge against me resulting in the suspension order, i.e., my alleged "failure to cooperate" with an order directing me to submit to a medical examination.

Indeed, I am now considering the possibility of filing an amicus brief, or seeking renewal by way of intervention or otherwise. I have spoken to the Deputy Clerk in the State Court of Appeals today and was advised by him that in the present state of the Court's calendar, it would not be likely that the case would be argued before May.

I would, therefore, respectfully request that there be no action taken in this matter at the present time, to permit a decision by the Court of Appeals, which could be dispositive of my own. Since I am not

practicing in the federal courts, there is no possible prejudice.

In further response to the Order to Show Cause, I submit for your consideration a copy of my Brief submitted in support of my own leave application to the Court of Appeals this past summer. As you can readily see, the arguments presented are most serious, not the least of which are the constitutional infringement of my rights that has occurred by virtue of a completely unjustified totally hearing-less (before or after the Order) immediate, unconditional, indefinite suspension. Should you wish a copy of the Appendix, please let me know.

Finally, in the interests of fairness, due process, and justice, I reiterate my request that before any action in this Court, pursuant to your published rules, I be afforded the plenary hearing denied me in the state system.

Most respectfully,
s/
DORIS L. SASSOWER

DLS/er
Enclosures (2)

PETITIONER'S APPELLANT'S BRIEF, filed January 10, 1997 in the Second Circuit Court of Appeals

ISSUES PRESENTED FOR REVIEW

As evidenced from the course of the proceedings and the subject Decision, should the District Judge have recused himself for bias?

1. Did the uncontroverted and documented conduct of the District Judge, as set forth in Plaintiff's Order to Show Cause for his recusal and her motion for reargument, reconsideration, and renewal, show a pattern of pervasive bias requiring him to recuse himself?

2. Did the District Judge wrongfully fail to adjudicate Defendants' litigation misconduct, where the uncontroverted record showed their dismissal motion and Answer were based on fraud, misrepresentation, and other misconduct?

3. Did the District Judge wrongfully delay, fail to sign, and thereafter deny Plaintiff's Order to Show Cause for a Preliminary Injunction, with TRO, where she demonstrated irreparable injury and her entitlement to summary judgment as a matter of law?

4. Did the District Judge wrongfully deny summary judgment to Plaintiff where she expressly sought such relief, her Rule 3(g) Statement and supporting affidavit were uncontroverted by any evidence, and her legal showing of entitlement was undenied and undisputed?

5. Did the District Judge wrongfully convert Defendants' Rule 12(c) dismissal motion into one

for summary judgment where (a) Defendants expressly disclaimed summary judgment relief on their part; (b) he gave Plaintiff no notice of his intention to sua sponte convert Defendants' dismissal motion to one for summary judgment in their favor so that she could be heard in opposition thereto; (c) his stated basis for conversion in Defendants' favor was false as to them; (d) Defendants' dismissal motion and Answer were based on demonstrated fraud, misrepresentation, and other sanctionable misconduct; (e) Defendants presented no evidence rebutting the Complaint's material allegations and failed to defend the constitutionality of New York's attorney disciplinary law, as written as applied to Plaintiff?

PETITIONER'S APPELLANT'S BRIEF, filed January 10, 1997 in the Second Circuit Court of Appeals

POINT I

THE DISTRICT JUDGE WRONGFULLY FAILED TO SIGN PLAINTIFF'S ORDER TO SHOW CAUSE FOR HIS RECUSAL AND WRONGFULLY DENIED IT

The Decision [R-13] fails to identify that Plaintiff sought recusal by way of an Order to Show Cause, which the District Judge did not sign [R-13]. It also omits that Plaintiff's recusal motion was not only brought under 28 U.S.C. §144, but also under 28 U.S.C. §455, as the face of the Order to Show Cause shows [R-643, R-645]. In fact, on October 27, 1995, when the District Judge denied Plaintiff's recusal motion from the bench, he explicitly stated:

> "With respect to the issue of whether or not recusal is required under §144 -- and I am treating the application as one made under §455 as well, in the interest of having one issue presented to the Court of Appeals -- in my view the plaintiff hasn't come close to showing what is required." [R-764]

Whereas §455(b)(1) is construed in pari materia to §144, both referring to "a personal bias or prejudice" against a party or in favor of an adverse party, §455(a) is broader, requiring recusal whenever a judge's "impartiality might reasonably be questioned", Apple v. Jewish Hospital and Medical Center, 829 F.2d 326, 333 (2d Cir. 1987). As this Circuit further recognized in U.S. v. Brinkworth, 68 F.3d 633 (2d Cir. 1995), citing H.R. Rep. No. 1453, 93 Cong, 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6355:

> "[§455(a)] is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge decide the case".

Moreover, §455 has no express timeliness requirement and does not

require the filing of a supporting affidavit of bias, Apple, supra, 333.

Under §144, once a timely and sufficient affidavit has been filed against a district judge, he is proscribed from taking further action. Contrary to the normal tenets of construction for a remedial statute, §144 has been strictly construed so as to permit the very judge whose recusal is being sought to decide the timeliness and sufficiency of the affidavit filed against him, 13A Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 2d, §3542, at 555 (1984 ed.). The predictable result, as reflected in the instant case, is that the District Judge found Plaintiff's timely and sufficient affidavit to be "untimely" and "insufficient".

The transcript shows that the District Judge's stated reason why Plaintiff's affidavit supporting her recusal motion "hadn't come close" to establishing the requisite personal bias was because

> "the law is clear that the basis for personal bias has to result from some personal bias that arises outside the record or is not the result of any conduct or action taken by the Court in response to conduct or arguments made by the parties" [R-764. ln. 2].

The Decision cites no legal authority to support such from-the-bench assertion as to the "clear" law which the District Judge did not then particularize. In fact, the law of the U.S. Supreme Court -- and this Circuit -- has not only been anything but "clear", but is to the contrary.

More than two years before the subject Decision, the Supreme Court put to rest the notion that disqualification under §144 and §455 could not be based on judicial conduct in the proceeding. In Liteky v. U.S., 114 S.Ct. 1147 (1994), the five judge-majority and the four judges, who concurred only in the judgment, spoke with one voice on the subject. As stated in Justice Kennedy's concurrence:

> "...the Court is correct to conclude that an allegation concerning some extrajudicial matter is neither a necessary nor a sufficient condition for disqualification under any of the recusal statutes." (at 1160, emphasis added).

In applying the "extrajudicial source doctrine" to §455(a) -- which

was the issue before the Supreme Court and from which the minority dissented as not ensuring the statutory requirement of recusal whenever a judge's "impartiality might reasonably be questioned" -- the majority conceded that "there is not much doctrine to the [extrajudicial source] doctrine" (at 1157). This is because the majority construed the "extrajudicial source doctrine" to encompass conduct within a litigation manifesting a bias or prejudice that is "wrongful or inappropriate"[20]. The Court's opinion makes plain that where a judge's behavior within a proceeding is not "within the bounds of...ordinary efforts of courtroom administration" and where he "display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible" a recusal motion is proper (at 1157).

Indeed, years prior to Liteky, this Circuit explicitly stated: "We do not read the authorities as holding that a judge's conduct of proceedings before him can never form a basis for finding bias." United States v. Wolfson, 558 F.2d 59, 63 (2d Cir. 1977), thereafter quoted by the Circuit in United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981)[21].

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[20] The majority appears to reject that these are exceptions" to the doctrine. Thus, when the Court describes (at 1155) the doctrine's "flexible scope", it adds the words "the so-called 'exceptions'"-- thereby signifying its disagreement with that terminology. Similarly, in describing that a bias or prejudice may be "so extreme as to display a clear inability to render fair judgment, it adds "[T]his explains what some courts have called the 'pervasive bias' exception to the 'extrajudicial source doctrine'".

[21] See also, In Re IBM, 618 F.2d 923, 928 (2d Cir. 1980), whose footnote 6 reads in pertinent part:

> "...in court conduct and rulings may be relevant to establish extrajudicial prejudice is a dictum in this court's opinion in Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968). While we agree...the fact is that no case in this circuit has ever found such bias on the basis of a trial court's rulings or conduct."

If 17 years later such dictum remains still true, it is submitted that this case deserves to be the first in which virulent pervasive bias, mandating recusal, is thus established.

The Decision does not refer to the District Judge's having found Plaintiff's supporting affidavit "insufficient" on October 27, 1995, but rather as "lacking in merit because it alleged at best a dissatisfaction with the Court's rulings" [R-14]. The law is well-settled that it is not the province of the judge who is the subject of a recusal affidavit to decide its "merit". Berger v. United States, 255 U.S. 22, 36 (1921).

Plaintiff's affidavit was more than "sufficient" in alleging the District Court's pervasive and virulent bias: It particularized a pattern of aberrant, abusive, and legally insupportable behavior by the District Judge -- all wrongfully and inappropriately favoring Defendants and prejudicing Plaintiff -- reaching a crescendo on September 28, 1995, when, after two months of court-caused delay, Plaintiff finally was given the opportunity to present her Order to Show Cause for a Preliminary Injunction and TRO. The District Judge's misconduct on that date, the centerpiece of her recusal motion, included: (1) his pretended ignorance of the most basic allegations of the Complaint and the posture of the case -- all set forth in the Order to Show Cause before him [R-650-652]-- which he claimed to have "looked at" [R-701, ln.5]; (2) his deliberate misrepresentation of the law as to his §1983 jurisdiction, as reflected by his own prior decision in Mason v. Disciplinary Committee [R-653-657; R-704]; (3) his courtroom advocacy for Defendants in advancing defenses on their behalf [R-659, See also R-675-81; R-681, ln. 9; R-689, ln. 23]; (4) his relieving Defendants from their default in opposing Plaintiff's summary judgment application, without a formal motion, based on his own speculation and notwithstanding Plaintiff's uncontroverted showing of their litigation misconduct [R-661-666];(5) his refusal to sign Plaintiff's Preliminary Injunction/TRO Order to Show Cause and false pretense that it required no response from Defendants [R-661-662; R-648-650], when it plainly did.

Nor was Plaintiff's renewal of her recusal motion "based upon an assertion that the Court imposed upon her a short deadline to file her motions", as the Decision purports [R-14], but on many months of aberrant, sadistic, and wrongful behavior by the District Judge from the October 27, 1995 date she presented her recusal Order to Show Cause onward. The District Judge's misconduct on October 27, 1995 included: (6) arbitrarily limiting Plaintiff's recusal argument to "five minutes" and refusing to accept her supporting

Memorandum of Law [R-758]; (7) failing to sign her recusal Order to Show Cause and summarily ruling upon it from the bench [R-762]; (8) permitting Mr. Weinstein to orally argue his motion for judgment on the pleadings, but denying Plaintiff a meaningful opportunity to respond thereto or to the District Judge's questions [R: 750, ¶14(a), R-772, R-785, R-789]; (9) denying Plaintiff her right to orally argue her summary judgment/sanctions application [R-751: ¶14(b), R-774, R-785, R-789]; (10) tolerating, without penalty or reprimand, Mr. Weinstein's continued misconduct at oral argument, including repetition of his false claims about an "underlying disciplinary proceeding" and the Second Department's "jurisdiction" [R-749: ¶13; 50, R-783]. Thereafter, (11) his issuing a factually erroneous, legally unsupported November 7, 1995 Order [R-748, ¶9]; (12) his unexplained failure and refusal to respond to Plaintiff's reasonable letter requests for clarification thereof [R-748, ¶¶10-12; R-790; R-797; R-800]; (13) his callous disregard for the irreparable, substantial injury being caused Plaintiff by the Second Department's retaliatory conduct in adjudicating her appeals in other cases in which she was involved [R-797-8; R-801-2; R-854]; and (14) his readiness to entertain Defendants' frivolous and perjurious Rule 41(b) sanctions motion against Plaintiff for her supposed failure to comply with his unexplained, unauthorized November 7, 1995 Order [R-749: ¶¶11, 13]. That the Decision makes it appear [R-21: fn 8] that but for the dismissal of Plaintiff's claims Mr. Weinstein's unfounded Rule 41(b) motion might be seriously entertained only further demonstrates the District Judge's outright perversion of the record and disqualification for bias.

The Decision cites only two cases on the recusal issue -- not on the issue of sufficiency, but explicitly as to timeliness, Brinkworth, supra, and Apple, supra [R-14]. Brinkworth (at 639) approvingly cites Apple in acknowledging that §455 contains no timeliness requirement[22], which has been "judicially implied" and in reiterating what Apple stated: "a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a

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[22] The Liteky minority also noted there was no analogous time requirement in §455(a) and (b)(1) (at 1160).

claim", Brinkworth (at 639).

The facts impelling Plaintiff's recusal motion and dispelling any doubt as to the District Judge's fixed and biased predisposition were those evidenced by his conduct on September 28, 1995. It was at that point, not earlier, that Plaintiff determined that she could unquestionably meet the high burden of showing the District Judge's unalterable and virulent bias in the litigation[23]. Prior thereto, the District Judge's actions, albeit improperly favoring Defendants, could be camouflaged as part of his so-called administrative handling of the case: instructing Plaintiff not to write to him, then restricting Plaintiff to communicating with him in writing; instructing Plaintiff to respond to Defendants' sanctionable dismissal motion and deferring adjudication on the sanctions issue to adjudication of the motion; and threatening Plaintiff with contempt and sanctions when she sought legitimate relief. Such rulings by the District Judge made the litigation procedurally burdensome, offensive, intimidating, and unfair for Plaintiff, but, even taken together with his relieving Defendants of their default in answering the Complaint, did not necessarily reach the impossibility of a fair trial standard articulated by the Liteky majority, albeit criticized at length by the minority (at 1161-3). As Plaintiff pointed out to the District Judge at oral argument [R-760], §144 limits a party to one recusal affidavit in the case, US v. IBM, 539 F. Supp. 473 (S.D.N.Y. 1982). Consequently, until she was certain that she could satisfy the high threshold showing of "sufficiency", a §144 motion would have been premature. However, on September 28, 1995 [R-668], the District Judge's conduct was such as to leave no doubt that he would shamelessly pervert law and facts to prevent Plaintiff from obtaining the substantive relief to which she was

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[23] The record shows that the District Judge's view of timeliness was part and parcel of his misrepresentation of the law about judicial bias expressed in the litigation [R-773]:

Plaintiff: "When would your Honor believe that I should have made the recusal motion prior to now?

Judge: "If you had facts that indicated a personal bias outside the record, as the law requires, you should have filed that probably when the case began."

entitled as a matter of law. Indeed, that is precisely what the District Judge has done in his instant Decision, which, as demonstrated herein, is entirely unsupported by the record and built on falsification, misrepresentation, and omission of material facts and controlling law.

The record before the District Judge showed [R-760, R-731-2] that the transcript of the September 28, 1995 proceedings was "immediately ordered from the court reporter..." and "within two weeks of plaintiff's receipt of the transcript" her recusal Order to Show Cause was filed [R-760, ln. 4, ln. 10][24].

In contrast to Apple, it would appear from Brinkworth that only if a party has not diligently brought a recusal motion after acquiring knowledge of the facts giving rise to claimed bias does the court embark upon a "four-factor test" for determining timeliness of the recusal motion; to wit, whether (1) the movant has participated in a substantial manner in trial or pre-trial proceedings...(2) granting the motion would represent a waste of judicial resources...(3) the motion was made after the entry of judgment...and (4) the movant can demonstrate good cause for delay".

As pointed out by Plaintiff in support of her recusal Order to Show Cause, the case at bar was still in the pleading stage, with no discovery having been had [R-759]. This contrasts sharply with both Apple and Brinkworth.

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[24] Cf., In Re Roldan-Zapata, 872 F.2d 18, 19 (2d Cir. 1989), dissent from denial of mandamus by Judge Newman, noting the importance of a court transcript to document "evidence of partiality" for recusal motion and petitioner's prompt efforts to obtain same.

PETITIONER'S APPELLANT'S BRIEF, filed January 10, 1997 in the Second Circuit Court of Appeals

POINT II

THE DISTRICT JUDGE WRONGFULLY FAILED TO ADJUDICATE PLAINTIFF'S ENTITLEMENT TO SANCTIONS AGAINST DEFENDANTS

As evident from "The Course of the Proceedings Before The District Judge" [pp. 12-30 infra], no issue was pressed more vigorously by Plaintiff than her entitlement to sanctions against Defendants for their litigation misconduct. Yet, the Decision obliterates that issue and with it any adjudication thereon.

The importance of sanctions to deter and punish conduct that defiles the integrity of the judicial process and the wide range of sanctioning devices available to a court has been the subject of important decisions by the U.S. Supreme Court and by this Circuit. Among this Circuit's decisions, which incorporate those of the Supreme Court and discuss the standards governing imposition of sanctions, are Eastway Construction Corp. v. New York, 762 F.2d 243, 253 (2d Cir. 1985); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986); Greenberg v. Hilton Int'l Co., 870 F.2d 926 (2d Cir. 1989); McMahon v. Shearson/American Exp., Inc., 896 F.2d 17 (2d Cir. 1990).

These particular Circuit cases are cited in decisions the District Judge has rendered in cases in which he has imposed Rule 11 sanctions, e.g., Yonkers v. Otis Elevator Co., 649 F. Supp. 716, 735 (1986); Empire Pharmaceutical Society, Inc. v. Empire Blue Cross & Blue Shield, 778 F. Supp. 1253, 1258 (1991); Keles v. Yale University, 889 F. Supp. 729, 735 (1995). In the latter decision, rendered only weeks before Plaintiff filed her written sanction request against Defendants [R-168(b)], the District Judge, citing further Second Circuit authority, noted that the 1993 amendment to Rule 11 did not alter the prior Rule 11 standards insofar as they imposed "an affirmative duty" upon parties and their counsel to conduct "a reasonable inquiry into the factual and legal viability of claims".

The amended Rule 11 expanded the sanctionable conduct from "signing" a paper to "presenting" it to the court -- a term expressly defined as "signing, filing, submitting or later advocating" a paper [Rule 11(b)]. This includes "oral advocacy" based thereon, as recognized in the Advisory Committee's Notes, U.S.C.A. Title 28, 1996 Cumulative Annual Pocket Part, at 222. See also, O'Brien v. Alexander (2d Cir. Docket #95-7976, 12/12/96). The amended Rule requires a "safe harbor" warning to those chargeable with a Rule 11 violations so as to afford them an opportunity to withdraw or correct unfounded claims [Rule 11(c)(1)(A)]. It also defines a court's power to initiate such sanction "on its own initiative" by means of an order to show cause to the "attorney, law firm, or party" whose conduct appears violative of that rule [Rule 11(c)(1)(B)]. The Advisory Committee Notes specifically identify that the court may make an "additional inquiry" to ascertain proximate and ultimate responsibility for the sanctionable misconduct:

> "For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it." (at 223)

In his Keles decision, the District Judge specifically noted that the attorney upon whom he was imposing sanctions had ignored warnings of possible Rule 11 violations, "thereby necessitating costly motion practice and wasting sparse judicial resources", supra, at 736. This is consistent with the Advisory Committee Notes to the 1993 Amendment that the revision "broadens the scope" of the obligations of attorneys and pro se litigants "to refrain from conduct that frustrates the aims of Rule 1" (at 221). That basic Rule, upon which all other Federal Rules of Civil Procedure rely, is designed "to secure the just, speedy and inexpensive determination of every action", a mandate reinforced by a 1993 amendment, the Advisory Committee's Notes to which state: "As officers of the court, attorneys share this responsibility with the judge.", U.S.C.A. Title 28, 1996 Cumulative Annual Pocket Part (at 23).

At bar, the District Judge denied Plaintiff the equal protection of the sanctions law, with which he is shown to have been quite familiar. Plaintiff's application for sanctions against Defendants

was made to the District Judge in her very first letter to him [R-718], complaining of Defendants' unethical and oppressive litigation tactics. This specifically included their refusal to stipulate to suspension of her federal action until the Supreme Court ruled on her Petition for a Writ of Certiorari, then being prepared. The transcript of the March 3, 1995 court conference shows that the District Judge denied Plaintiff's request to place the case on the suspense calendar, over her protest that it would be in the "interests of judicial economy" [R-186, ln. 5] and would spare her from having to litigate "on two fronts" since she did not have "the resources of the State Attorney General's Office" [R-186, ln.16]. Despite Mr. Weinstein's claim that he had not reviewed Plaintiff's Petition for a Writ of Certiorari and thus could not respond to the District Judge's question as to whether a Supreme Court decision would "resolve all the issues" raised by Defendants' motion [R-187, ln. 12], the District Judge countenanced his opposition.

Although the District Judge stated that his denial of Plaintiff's request was based on his view that Defendants' dismissal motion was "colorable" [R-188, ln. 9], he refused to conduct a "two-minute inquiry" into whether, as Plaintiff argued, his decision as to the "colorability" of Defendants' dismissal motion was based on their "pivotal" misrepresentations in that motion [R-190, ln. 20]. Instead, he required Plaintiff to include her Rule 11 sanctions objections in her opposition, stating he would defer consideration "until such time as I have ruled upon the merits of the motion" [R-191]. As plain from the Decision, it was more than a year later that the District Judge ruled on the so-called "merits" of Defendants' motion and, even then, did not adjudicate Plaintiff's sanctions entitlement.

The March 3, 1995 transcript shows that the District Judge stated: "if my decision as to colorability can be satisfactorily proved it was based upon his misrepresenting facts to me, I will hear that on October 27th" -- the date he scheduled for oral argument of Defendants' dismissal motion. Yet, on October 27th, he ignored the issue entirely. On that date, the undisputed and indisputable record before him showed that: (1) Defendants' dismissal motion was predicated on falsification, distortion, and concealment of the material allegations of the Complaint and deliberate misrepresentation of law [R-168b; R-460]; (2) Defendants' Answer was knowingly false, fraudulent, and in bad-faith as to <u>over 150</u> allegations of the

Complaint [R-275]; (3) Defendants' bald denials of her Rule 3(g) Statement, buttressed only by Casella's irrelevant, non-probative, and misleading affidavit [R-630], was sanctionable under Rule 56 [R-734].

The litigation misconduct of Defendants and their co-Defendant counsel, documented in the record before the District Judge, presented a classic Rule 11 case. Indeed, beyond that, it rose to the level of "fraud upon the court", as that term has been applied in this Circuit, Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960); Kupferman v. Consolidated Research & Mfg. Corp, 459 F.2d 1072, 1078, 1081 (2d Cir. 1972); Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988), Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995); See also, Cresswell v. Sullivan & Cromwell, 771 F. Supp. 580, 586 (S.D.N.Y. 1991)[25]. The law is well-established that courts possess inherent power and a duty to defend their integrity and protect themselves from "fraud upon the court", Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946) and, particularly, where, as here, it involves more than the individual litigants.

At bar, the issues involved corruption by public officials, including high-ranking sitting judges of the State of New York and the state's highest legal officer, the New York State Attorney General, and deliberate misuse of judicial and disciplinary power to retaliate against a judicial whistle-blower, combined with an unconstitutional attorney disciplinary law. Unquestionably, this case transcended the individual litigants. Yet, the District Judge not only ignored Plaintiff's uncontroverted sanctions applications, but disregarded his "own initiative" power under Rule 11(c)(1)(B), as well as his inherent power to evaluate and punish Defendants' fraudulent and deceitful conduct. Exercise of such "initiative" and inherent power is even more warranted where it is on behalf of an

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[25] See also, DR 7-102(A.5) of the Model Rules of Professional Responsibility: a lawyer may not "knowingly make a false statement of law or fact"; ABA Model Rules of Professional Conduct, Rule 3.3, "Candor Toward the Tribunal"; Rule 8.4 "Misconduct".

unrepresented litigant, who is to be afforded the court's protection, Haines v. Kerner, 404 U.S. 519 (1972)[26].

The District Judge's refusal to adjudicate the fraud and misconduct before him constitutes his complicity and collusion therewith. It demonstrates his overriding bias and wrongful protection of Defendants -- not just from liability for sanctions, but from ultimate liability in Plaintiff's federal action. Indeed, the very issues that were at the heart of Plaintiff's sanction applications, if resolved, would have made it impossible for judgment to be rendered to Defendants. The District Judge's awareness of this fact shows in his Decision.

As illustrative, in the Decision's first sentence, the District Judge ambiguously refers to Plaintiff's suspension as resulting "out of state disciplinary proceedings" [R-4]. In the "Background" recitation, he makes it appear, by shearing off the pertinent allegations of the Complaint, that there is some causal connection between the Suspension Order and the February 6, 1990 disciplinary petition [R-5-7]. Thereafter, the District Judge grants the Second Department absolute judicial immunity for acting within its jurisdiction, making reference to a "disciplinary petition" [R-18].

No issue was more pivotal to Plaintiff's repeated sanction requests against Mr. Weinstein than his false claim in Defendants' dismissal motion that her Complaint alleged an "underlying disciplinary proceeding" [R-144], his selective recitation of the Complaint's allegations to make it appear, but without saying so, that there was a causal connection between the Suspension Order and the February 6, 1990 disciplinary petition [R-144-145], and his affirmative claim in his oral advocacy that there was an "underlying disciplinary proceeding" to Plaintiff's suspension [R-768: ln. 2, ln. 17; R-781: ln. 22; R-782: ln. 6]. Clearly, adjudication of Plaintiff's entitlement to sanctions for such pivotal misrepresentations by Mr.

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[26] In the context of her recusal Order to Show Cause [R-657, ¶24], Plaintiff expressly directed the District Judge's attention to his special obligations to her, as a pro se litigant, under Haines v. Kerner. Cf. the District Judge's own citation to Haines v. Kerner in his decisions in other cases: Sadler v. Brown, 793 F. Supp. 87, 88 (1992); Jones v. Capital Cities/ABC, 874 F. Supp. 626, 628 (1995).

Weinstein, all documented by her, would have precluded the District Judge from ambiguously presenting them in his Decision, which is what he needed to do to render judgment for the Second Department and what he wrongfully did do.

The record shows this starkly. On March 3, 1995, Plaintiff requested that "the Rule 11 clock" start running for Mr. Weinstein's fraudulent dismissal motion claim that her Complaint alleged an "underlying disciplinary proceeding" [R-189, ln. 3] -- which Mr. Weinstein unequivocally asserted was "not a lie" [R-189, ln. 17]. She pointed out that ten allegations of her Complaint stated that her suspension was "unrelated to any pending disciplinary proceeding, that there was **no** underlying disciplinary proceeding" [R-199, ln. 6].

Following the District Judge's instructions, Plaintiff embodied in her opposing papers her sanction request, identifying the specific allegations of her Complaint that there was **no** "underlying disciplinary proceeding" [R-179; R-463]. Indeed, more than that, Plaintiff provided the District Judge with the precise references to documents in the disciplinary file, as particularized in her "Chronology" [R-201] and "Critique" [R-275], so as to substantiate those allegations [R-181] -- as well as all other allegations of her Complaint, which Defendants' Answer [R-108], submitted by Mr. Weinstein, had "deni[ed]", "den[ied], upon information sufficient to form and belief" or "den[ied] upon information and belief". Her presentation as to the fraudulence and frivolousness of Defendants' Answer, their dismissal motion, and Mr. Weinstein's oral advocacy, was so clear and convincing that Plaintiff combined with it a request for Rule 12(c) conversion for summary judgment in her favor [R-168(b); R-454].

Even after the District Judge wrongfully relieved Defendants from their default on September 28, 1995, such that they had 3½ months to respond to Plaintiff's summary judgment/sanction application, Mr. Weinstein's opposition papers only further demonstrated the appropriateness of sanctions.

Mr. Weinstein's "Memorandum of Law", which cited no law, made a series of flagrantly false statements of fact [R-640]. Conspicuously, Mr. Weinstein did not place them in an affidavit -- even though the District Judge had instructed him as to such basic requirement on March 3, 1995 [R-194, ln. 9], an instruction he expressly acknowledged [R-194, ln. 15]. Pretending that the sole

sanctions issue as to Defendants' Answer was Plaintiff's objection that they had answered collectively -- Mr. Weinstein's Memorandum gave a legally unsupported "gobbledy-gook" response [R-641]. As to Defendants' dismissal motion, Mr. Weinstein did not refer to it and did not deny or dispute that in it he had misrepresented the allegations of the Complaint and misrepresented the law, as detailed by Plaintiff's Memorandum of Law in opposition to his dismissal motion [R-460]. Instead, he pretended that "defendants' statement" about an "underlying disciplinary proceeding" was

> "a reasonable inference from statements contained in the complaint and supported by court documents of which this Court may take judicial notice" [R-641].

This was a further blatant lie. The Complaint not only unequivocally alleged that there was "**no** underlying disciplinary proceeding" [R-46: ¶79(d), but that the contrary claim, which first appeared in the October 18, 1990 Order, thereafter repeated by Casella with reference to the February 6, 1990 disciplinary petition, was a knowing and deliberate deceit and fraud [R-48: ¶87; R-55: ¶¶108-109]. These are the very challenged documents to which Mr. Weinstein points for his claimed "inference" [R-641], omitting, by the end of his so-called "Memorandum of Law" the critical first word "underlying" from "disciplinary proceeding" [R-642].

Plainly, Mr. Weinstein's admission in his "Memorandum of Law" that his statement as to an "underlying disciplinary proceeding" was an "inference" was a concession that he had no personal knowledge of that fact. That Mr. Weinstein did not have his clients, who had direct personal knowledge, give an affidavit on the subject or provide him with the documentary proof thereon, reflects a further concession of the truth of the Complaint's pivotal allegation, to which Plaintiff swore, that there **no** "underlying disciplinary proceeding" to the Suspension Order. Casella's flimsy, but misleading affidavit [R-630], which Mr. Weinstein submitted, is conspicuously silent as to that key issue, as it is to every other. Indeed, it does not deny or dispute even a single one of Plaintiff's record references showing that Defendants' Answer was knowingly false in its responses to over 150 allegations of the Complaint, including those relating to the erroneous October 18, 1990 Order and the separate and unrelated February 6,

1990 disciplinary petition. Such affidavit palpably met the standard for Rule 56(g) sanctions [R-737], Warshay v. Guinness PLC, 750 F.Supp. 628, 640 (S.D.N.Y. 1990).

This was the state of the record before the District Judge in the three weeks prior to the scheduled October 27, 1995 oral argument. Based thereon, one would have expected the District Judge to have canceled the oral argument on Defendants' dismissal motion and to have issued a show cause order to Mr. Weinstein, pursuant to Rule 11(c)(1)(B) [Cf. R-696, ln. 13], giving him notice that he and his state clients were facing severe sanctions, the least of which was Rule 11. This would have been consistent with the District Judge's vehement statements on March 3, 1995 about the dire consequences of lawyers lying, including disciplinary referral and suspension from practice [R-189, ln. 18; R-193, ln. 14; R-194, ln. 20] -- a warning made in the context of Mr. Weinstein's definitive claim about an "underlying disciplinary proceeding". Certainly, at the October 27th oral argument itself, one would have expected the District Judge to be swift, forceful, and severe in demanding an explanation from Mr. Weinstein -- not only as to that demonstrated lie, but about the countless lies permeating his dismissal motion and Answer. Based upon Plaintiff's uncontroverted May 25, 1995 letter to Assistant Attorney General Abramowitz [R-178], showing that Mr. Weinstein was apprised of Plaintiff's annotated "Chronology" even before he prepared Defendants' Answer, the District Judge could have been expected to have rigorously interrogated him as to what inquiry, if any, he had conducted and which Defendants had participated in the drafting of Answer. From the record, it appeared that Casella himself had personally participated therein [R-105][27].

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[27] It may well be that Defendants other than the Attorney General composed the Answer. In denying the Complaint's allegations relative to papers in the Article 78 proceeding, Defendants repeatedly qualify their denials by referring the federal court to the specified court papers for "it's (sic) contents" [R-120ff: ¶¶123, 126, 128, 137; 148; See also 147]. Presumably, in the Article 78 litigation, the Attorney General did not provide copies of the papers therein to his clients. On the other hand, over and again, these same Defendants "deny knowledge and information sufficient to form a belief" and "deny upon information and belief" allegations in the Complaint pertaining to documents from the disciplinary file in their possession, as

Plaintiff's May 25, 1995 letter [R-178] was the ultimate "safe harbor" warning. It not only specifically requested that Defendants' Answer and dismissal motion be withdrawn on pain of sanctions, but offered Plaintiff's full cooperation and assistance so as to enable the Attorney General to meet his ethical duty. There could be no question, thereafter, as to the larger liability of the Attorney General's office for Mr. Weinstein's misconduct[28]. "Additional inquiry", as contemplated by the Advisory Committee Notes, was appropriate, indeed, essential as to why the Attorney General's office had not withdrawn Defendants' dismissal motion and Answer, thereby needlessly burdening Plaintiff and the court. Such failure may have been attributable to the Attorney General's status as a party-defendant in the action, which liability arose out of his official misconduct in representing the Defendants in Plaintiff's Article 78 proceeding. The question whether the Attorney General could ethically represent his co-Defendants herein was a conflict-of-interest issue expressly noted in Plaintiff's affidavit supporting her sanction application [R-170, ¶9].

Nevertheless, the District Judge conducted oral argument as if there were no sanctions or conflict-of-interest issue before him. He entertained Defendants' dismissal motion, inviting Mr. Weinstein to argue it, and reminding him, but not by way of chastisement, that in a motion to dismiss on the pleadings he could not properly argue, as he was, against the allegations of the Complaint [R-766][29]. Nor

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particularized in Plaintiff's "Critique" [R-275].

[28] Cf. In the very week before Plaintiff made her sanctions motion, Judge Denise L. Cote imposed sanctions upon the Attorney General under Rule 16, Pearson v. Coughlin (S.D.N.Y., Judge Cote), NYLJ, 8/3/95, p.3 "Failure to Monitor Assistant Attorney General", "[I]t is the responsibility of that Office to hire Assistants who are capable of performing the work assigned to them, to supervise those Assistants to insure that they are meeting their responsibilities to their clients, their adversaries, and to the Court, and to monitor each of the cases within the Office to insure that the Office's clients are being adequately, if not well represented."

[29] In fact, the issue was far more serious than Mr. Weinstein arguing against the allegations of the Complaint. Mr. Weinstein had misrepresented

did the District Judge reprimand Mr. Weinstein during the argument for his disingenuous reply that as between a dismissal motion and summary judgment, he didn't know "what possible difference it could make" [R-768, R-781], and his repetition of his challenged affirmative claim as to the existence of an "underlying disciplinary proceeding", which only three weeks earlier he had admitted to be based on "inference" [R-641].

Of course, the question as to whether there was an "underlying disciplinary proceeding" bore upon the Complaint's material allegation that the Second Department had acted "without jurisdiction" in suspending Plaintiff's law license.

According to Mr. Weinstein's dismissal motion, there was "no indication in the complaint" that the Second Department was "proceeding in the clear absence of all jurisdiction" [R-158]. The palpable untruth of this material claim was demonstrated in Plaintiff's summary judgment/sanction application [R-479]. Still, at the October 27, 1995 oral argument, the District Judge, although impliedly recognizing that the Complaint alleged that there was no jurisdiction on the part of the judicial Defendants [R-767, ln. 13], allowed Mr. Weinstein to assert that the Second Department had jurisdiction [R-785, ln. 1][30], without any substantiation thereof, and to claim that he had made that argument in his dismissal motion [R-783, ln. 5], which was false. In fact, Mr. Weinstein's dismissal motion simply confined itself to a boiler-plate assertion that there was "no indication in the complaint" that Defendants had acted without jurisdiction [R-158]. It contained absolutely no argument as to the Second Department's jurisdiction and Defendants, in their Answer, had specifically denied Plaintiff's allegation that the Second Department had general disciplinary jurisdiction under §90(2) [R-109: ¶12; R-123: ¶154].

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the allegations of the Complaint so as to conceal that he was arguing against them [R-463].

[30] As recognized by the District Judge in another case, Equitable Life Assurance Soc. v. Attorney Gen. of United States, 1989 US Dist. Lexis 11274: fn. 2: "...assertions of counsel are of no evidentiary value. See Wyler v. U.S., 725 F.2d 156, 160 (2d Cir. 1983)"

Just as Mr. Weinstein's dismissal motion also claimed that the Complaint had not alleged that Defendants' actions were "inconsistent with existing law" or violated Plaintiff's "clearly established statutory or constitutional rights of which a reasonable person would have known" [R-160], Plaintiff's summary judgment/sanction application rebutted these palpable untruths [R-483-486]. Yet, here too, the Decision, rather than adjudicating Mr. Weinstein's misconduct, purposefully omits, confuses, and misrepresents the law and facts showing that Plaintiff's fundamental constitutional rights were grievously invaded. Thus, much as Mr. Weinstein omitted from Defendants' dismissal motion any mention, let alone discussion, of the express requirements of Judiciary Law §90 and §691.4 et seq. and of the dispositive cases of Nuey and Russakoff -- all of which the Complaint alleged to have been knowingly violated by Defendants, so does the Decision omit or distort them. Indeed, much as Plaintiff's summary judgment/sanction application demonstrated that Mr. Weinstein's dismissal motion had stripped away the Complaint's allegations of law-less, jurisdiction-less, retaliatory conduct by Defendants so as to misrepresent her as just another disgruntled litigant [R-465], the Decision does the same thing.

The compelled inference is that the District Judge did not adjudicate Plaintiff's dispositive sanction applications relative to Defendants' dismissal motion, Answer, and Casella's affidavit because doing so would have required him to identify the very stratagem of falsification and concealment that he himself would use in his Decision to "dump" the case.

PETITIONER'S APPELLANT'S BRIEF, filed January 10, 1997 in the Second Circuit Court of Appeals

POINT IV

THE DISTRICT JUDGE WRONGFULLY CONVERTED DEFENDANTS' DISMISSAL MOTION TO ONE FOR SUMMARY JUDGMENT IN THEIR FAVOR, *SUA SPONTE*, AND WITHOUT NOTICE TO PLAINTIFF

The District Judge's on-the-record colloquy with Mr. Weinstein at the October 27, 1995 oral argument establishes his awareness, albeit without saying so, that he could not grant Defendants' motion for dismissal on the pleadings because Mr. Weinstein had violated the legal standard for such motion by arguing against the Complaint's allegations that there was **no** "underlying disciplinary proceeding" to the October 18, 1990 Order and the Suspension Order and that those judicial Defendants were acting "without jurisdiction" [R-767, ln. 11].

Yet instead of denying Defendants' dismissal motion, with sanctions, the District Judge rewarded them by sua sponte and without notice, converting it into one for summary judgment in their favor. This he accomplishes in a quick footnote, as if it were inconsequential act and as if dismissal and summary judgment are interchangeable. Thus, in the conclusion to his Decision [R-21], the District Judge refers to "defendants' motion for summary judgment" -- which characterization, likewise, likewise appears in the Judgment [R-2].

Fed.R.Civ.P. 12(c) expressly states:

> "...all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56"[31].

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[31] "We give the Federal Rules of Civil Procedure their plain meaning.' Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. , 107, L.Ed 2d 438, 110 S.Ct. 459 (1989). As with a statute, our inquiry is complete if we

This fundamental due process requirement has been affirmed by the U.S. Supreme Court, Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) and over and over again by this Circuit, Gagliardi v. Village of Pawling, 18 F.3d 188, 191 (2d Cir. 1994); Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991); Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985); Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). See also, Herzog & Straus v. GRT Corp., 23 Fed Rules Serv.2d 370; F.2d (1977). For lower court decisions expressly giving notice of sua sponte conversion, See, Ribando v. Silhouette Optical, Ltd., et al., 94 Civ. 5155 (VLB) (S.D.N.Y. 1994); Jacobson v. Cohen, 151 F.R.D. 526 (S.D.N.Y. 1993).

In contrast to Gagliardi, supra, 191, where this Circuit held that the without-notice conversion of Defendant's motion was "irrelevant because the motion was decided solely on a review of the complaint", here the District Judge stated that his conversion was based on "voluminous affidavits" filed by "both parties" [R-12-3, fn. 3].

Although the District Judge cites Hanson v. McCaw Cellular Communic., 77 F.3d 663 (2d Cir. 1996), the district court decision in that case, 881 F.Supp. 911 (S.D.N.Y. 1995), shows that the affidavit upon which the court relied was identified and discussed (Id., at 915, 919). Here the District Judge fails to identify or discuss any of the "voluminous affidavits" as would support Defendants' entitlement to summary judgment. In fact, Defendants filed no "voluminous affidavits". Their only affidavit in support of their dismissal motion is the 2-paragraph non-affidavit of their counsel, Mr. Weinstein, annexing legal cases [R-129]. Other than that, there is only Casella's 2-1/4 page, 8-paragraph affidavit [R-630], whose irrelevant and non-probative content was the basis for a further sanction application by Plaintiff, pursuant to Rule 56(g) [R-734]. Thus, may be seen that the stated basis for the District Judge's sua sponte without-notice conversion is a flagrant falsehood by him, designed to conceal that there was no evidentiary basis for a

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find the text of the Rule to be clear and unambiguous.", Business Guides v. Chromatic Com., 112 L Ed. 1140, at 1152.

conversion to summary judgment in Defendants' favor.

It may be inferred that the reason the District Judge failed to provide any notice to Plaintiff of his sua sponte conversion of Defendants' dismissal motion to one for summary judgment in Defendants' favor is because notice would have enabled Plaintiff to expose in opposition papers -- rather than on appeal -- the utter baselessness of such conversion. The deliberateness with which the District Judge denied Plaintiff notice may be seen from his inexplicable refusal to respond to her four letters of inquiry [R-790, R-797, R-800, R-853] relative to his November 9, 1995 Order [R-794], which explicitly inquired as to the purpose for its sua sponte unauthorized request that she produce for the District Judge a copy of the state disciplinary file. Plainly, this was the time for the District Judge to have divulged his intentions, which apparently were to ferret the file to find support for grounding summary judgment to Defendants. No other purpose could be served by such request since -- as Plaintiff pointed out [R-791] -- the issues before the District Judge were "strictly matters of law, not fact" (emphasis in the original).

PETITIONER'S APPELLANT'S BRIEF, filed January 10, 1997 in the Second Circuit Court of Appeals

POINT V

THE DISTRICT JUDGE'S WRONGFUL DENIAL OF SUMMARY JUDGMENT TO PLAINTIFF AND GRANTING OF SUMMARY JUDGMENT TO DEFENDANTS FLOUTS THE FUNDAMENTAL STANDARDS FOR SUMMARY JUDGMENT AND FALSIFIES THE RECORD BEFORE HIM

B. THE DISTRICT JUDGE WRONGFULLY GRANTED DEFENDANTS SUMMARY JUDGMENT, FOR WHICH THERE IS NOT A SCINTILLA OF EVIDENCE

Since Defendants did not move for summary judgment and, moreover, had disclaimed doing so by expressly reserving their right to so move "at a future time" [R-626; R-783, ln. 25], they did not identify any "material fact" as to which there was "no genuine issue". Rule 3(g) of the General Rules of the Southern District explicitly states:

> "Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such statement constitutes grounds for denial of the motion."

Such General Rule advances the settled principle, reiterated by the Supreme Court decision in Celotex Corp. v. Catrett, supra, at 323:

> "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for

> its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact."

From the record before the District Judge, he knew that without a sua sponte grant of summary judgment to Defendants, they would be unable to formulate a Rule 3(g) Statement to support a summary judgment motion and bear their "initial responsibility" of substantiating their claims. Plainly, Defendants had no legitimate defense to the Complaint, as evident by their fraud and misrepresentation in their dismissal motion and Answer. Such misconduct should have disentitled them from any award of summary judgment, even were they entitled to one, which they were not. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933). Yet considerations of Defendants' "unclean hands" nowhere appear in the Decision.

In granting Defendants summary judgment based on defenses of Rooker-Feldman, res judicata, immunity, and Eleventh Amendment, the Decision does not refer to Plaintiff's uncontroverted Memorandum of Law which showed those defenses to be inapplicable [R-470-486]. As demonstrated therein, such defenses were based purely on Mr. Weinstein's rewriting of the Complaint and misrepresentation of the very cases he cited.

The District Judge replicates Mr. Weinstein's misconduct by similarly rewriting the Complaint to delete the material allegations vitiating those defenses and likewise misrepresents or omits the pertinent case law relative thereto. Thus, Points III, IV, and V of Plaintiff's Memorandum of Law [R-471-486] detailed that the allegations of the Complaint that Defendants acted without jurisdiction, without due process, in a biased, bad-faith, fraudulent manner, violative of non-discretionary clear and established law, and that she was deprived a full and fair opportunity to be heard precluded dismissal based on defenses of Rooker-Feldman, res judicata, and immunity[32]. The Decision does not deny these bed-

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[32] Plaintiff's Point II [R-470-471] demonstrated the inapplicability of an Eleventh Amendment defense, particularly pointing out that money

rock legal principles -- wholly undisputed by Defendants [R-639]-- and only demonstrates their correctness by hop-scotching through the Complaint to obliterate virtually every specific allegation of Defendants' jurisdiction-less, due process-less, biased, bad-faith, retaliatory conduct, violative of clear and unambiguous requirements of New York's attorney disciplinary statute and the Second Department's own court rules[37]

Notably, unlike Defendants' dismissal motion which, at least when identifying Plaintiff's Causes of Action, acknowledged that Plaintiff alleged she had been retaliated against "for exercising her First Amendment rights" and that Defendants had conspired to silence her "as a voice speaking out against judicial corruption by judges and lawyers in the Second Judicial Department of the Supreme Court of the State of New York" [R-147-8], the Decision does not even do that much. It obliterates every allegation from the Complaint relating to Defendants' retaliation against Plaintiff for her judicial whistle-blowing and the political context surrounding the events at issue. The Decision makes only a single isolated mention of free speech [R-11], whose inaccurate citation to the Complaint is bolstered by a reference to Plaintiff's Petition for a Writ of Certiorari [R-435-436].

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damages were available against state defendants sued in their personal capacities and that ¶¶9-10 of the Complaint [R-26-27] expressly identified Defendants' liability "in their personal capacities". Nevertheless, the Decision misrepresents the Complaint as seeking damages against Defendants in their official capacities [R-20] and ignores that the Eleventh Amendment does not bar injunctive and declaratory relief, as further argued in Plaintiff's Point II.

[37] The deliberateness with which the District Judge has done this may be seen from the fact that the specific violations and the retaliatory background to Defendants' actions are particularized not only in the paragraphs of the Complaint which the Decision selectively does not cite, but in the very paragraphs it does cite. Because many pages would be required to set forth, sentence-by-sentence, the gross and wholesale fashion in which the District Judge has literally rewritten the Complaint in granting Defendants summary dismissal, an Appendix comparing his recitation of the Complaint with what the Complaint actually says is annexed.

The significance of this may be seen from the District Judge's decision in Grossman v. Schwarz, 678 F.Supp. 440 (1988), which makes plain that special considerations govern §1983 actions asserting free speech claims. This is reflected by this Circuit's decisions as well, Bernheim v. Litt, 79 F.3d 318 (2d Cir. 1996), Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54 (2d Cir. 1987) ("Summary judgment is inappropriate where the allegation is that action was taken in retaliation for an exercise of constitutionally-protected freedoms", Id, at 59), Gagliardi v. Village of Pawling, supra, at 194-5 ("The rights to complain to public officials and to seek administrative and judicial relief are protected by the First Amendment"; "...the right 'to petition for a redress of grievances is among the precious of liberties safeguarded by the Bill of Rights'...and is 'intimately connected...with the other First Amendment rights of free speech and free press.'", quoting from United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967)). Plainly, Defendants' flagrant, unremitting violations of Plaintiff's fundamental due process and equal protection rights, as pleaded by the Complaint, support her allegations of retaliation. The Decision purposefully totally omits both the allegations of violations and of retaliation.

It must be emphasized that there is no evidence in the record rebutting the material allegations of the Complaint. None. This explains why the Decision fails to identify any proof by Defendants that would support summary judgment to them. Casella, who had first-hand, direct knowledge as to the majority of allegations of the Complaint, failed to make even a testimonial claim in his 2-1/4 page affidavit that Defendants had jurisdiction, complied with due process, that Plaintiff had a full and fair hearing before an improper tribunal, and that her federally-guaranteed rights were respected in the state forum.

Conspicuously, the Decision also never mentions Defendants' demonstratedly fraudulent Answer, which referred the court to state disciplinary documents not before it, and disingenuously deferred to the court for interpretation of New York's attorney disciplinary statute, the Second Department's rules, and New York Court of Appeals' decisions in Nuey and Russakoff. Yet, the District Judge fails to provide any interpretation of the jurisdictional and due process prerequisites of §691.4(l) -- the very

rule under which Plaintiff was suspended -- and §691.13(b)(1) -- the very rule pursuant to which the October 18, 1990 Order was issued -- let alone point to any evidence showing that Defendants complied therewith, which they nowhere even alleged that they did and, by reason of their claimed deference to the court's interpretation, could not allege. These were the specifically identified Second Department rules which the Complaint challenged, as written as and as applied [R-24: ¶2; R-83-87], and which Plaintiff analyzed at length in Point IV of her incorporated-by-reference Petition for a Writ of Certiorari [R-338-342].

Also specifically challenged by the Complaint were Judiciary Law §90(2) and §691.4 [R-24: ¶2, R-86: ¶226], likewise analyzed by Plaintiff in Point IV of her Petition for a Writ of Certiorari [R-338-342]. Defendants' Answer expressly denied that the Second Department had general disciplinary jurisdiction under Judiciary Law §90(2), as alleged at ¶19 of the Complaint [R-30], and deferred to the court for interpretation of that statutory provision [R-109: ¶12]. Their Answer also expressly denied that the Grievance Committee had general jurisdiction under §691.4(a), as alleged at ¶20 of the Complaint, and deferred to the court for interpretation of that rule provision [R-109: ¶13]. Only by misrepresenting the plain meaning of both those provisions has the District Judge been enabled to confer upon Defendants disciplinary jurisdiction they never asserted and expressly denied.

Firstly, the Decision misrepresents Judiciary Law §90(2) as conferring unqualified jurisdiction upon the Second Department to discipline attorneys [R-5]. For that proposition, which Defendants nowhere advanced, the Decision actually cites Plaintiff's ¶19 [R-30], which, as noted, Defendants' Answer denied. In fact, as reflected by Plaintiff's ¶19, Judiciary Law §90(2) contains the express statutory predicate for the Second Department's disciplinary jurisdiction to censure, suspend, or remove an attorney from practice: to wit, that the accused attorney be "guilty" of specified misconduct [R-351]. This is then further restricted by Judiciary Law §90(6) requiring that: "before an attorney or counselor-at-law is suspended or removed...a copy of the charges against him must be delivered to him

personally..." [R-351][38]

The allegations of the Complaint -- to which Plaintiff swore and further substantiated with uncontroverted record references [R-201; R-275] -- are that she was suspended without findings, the express prerequisite for suspension under Judiciary Law §90(2) and without "charges", the express prerequisite under Judiciary Law §90(6) -- which, there being no "charges" were never personally delivered upon her as Judiciary Law §90(6) further expressly requires.

As to §691.4 et seq. [R-346-350], notwithstanding the innumerable allegations of Plaintiff's Complaint[39] alleging that the only circumstances under which the Grievance Committee could lawfully dispense with the jurisdictional and due process requirements of §691.4(e)(4) of pre-petition "written charges", a pre-petition "written hearing", "findings of fact" based on evidence from the stenographically-recorded hearing, "a majority vote of the full committee" for the recommending of charges, a "written report", with a "minority report", if any, filed with the court, as specified by §691.4(f), (g), (h), and (I), are "where the public interest demands prompt action and where the available facts show probable cause for such action", the Decision [R-6] truncates the express exigency requirement and "probable cause" determination from §691.4(e)(5) so as to falsely make it appear that there is no restriction upon the Grievance Committee to proceed thereunder and that it is simply the fifth among four other equally available options. Only by so doing can the District Judge conceal Defendants' flagrant and deliberate violations of Plaintiff's rights in the authorization and perpetuation of

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[38] Indeed, §691.4(l) [R-533], the rule provision under which Plaintiff was suspended, expressly states:

> "The suspension shall be made upon the application of the Grievance Committee this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law." (§691.4(l)(2), emphasis added)

[39] See Complaint [R-23] ¶¶42, 128, 129, 149-150, 152, 161, 168, 174.

the three disciplinary proceedings against her, as particularized in the Complaint and substantiated in her summary judgment application. As Point IV of Plaintiff's Petition for a Writ of Certiorari pointed out [R-340], quoting Matter of Thalheim, 853 F.2d 383, 388 (5th Cir. 1988) "...it was the court that drafted these rules. The court wrote its own rules; it must abide by them."

The District Judge's failure to interpret Nuey and Russakoff, whose interpretation Defendants also explicitly left to the court, reveals his recognition that those cases are dispositive and controlling as to Defendants' violation of Plaintiff's fundamental constitutional rights, as well as the facial unconstitutionality of the Second Department's interim suspension rule, §691.4(l). Plainly, interpretation of Russakoff was quite relevant to the District Judge's question to Mr. Weinstein at the October 27, 1995 argument [R-771]: "She said she was deprived of any hearing? Do the statutes provide for no hearing?"[40] The District Judge's misrepresentation of the very rule under which Plaintiff was suspended, plainly a pivotal material allegation of her Complaint, bespeaks his conscious knowledge that §691.4(l) is constitutionally infirm, as recognized by the New York Court of Appeals in Russakoff.

Clearly, where, as at bar, state court attorney disciplinary rules are facially unconstitutional and not based upon state statutory authority, as Russakoff and Nuey reveal, the declaratory judgment relief sought in Plaintiff's First Cause of Action, does not require review of any state court decisions in Plaintiff's case. All that is

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[40] As hereinabove noted, Plaintiff's allegation that she was suspended without a hearing is the only specific due process violation relative to her suspension identified by the Decision. The Decision conceals the egregiousness of the fact that Plaintiff had no pre-suspension hearing by almost making it appear in its recitation that she did not oppose or challenge Casella's May 8, 1990 and January 25, 1991 Orders to Show Cause for her suspension as violative of her constitutional rights until after she was suspended [R-7-8]. That this is not the case may be seen from the many specific material allegations of the Complaint reflecting that she vigorously contested both Orders to Show Cause. Indeed, the only paragraphs of Plaintiff's Rule 3(g) Statement [R-454] admitted by Defendants relate to Plaintiff's having challenged each of the aforesaid two Orders to Show Cause [R-626-7: ¶¶2, 4].

required is facial examination of the court rules and related statutory provisions. Notwithstanding the inapplicability of Rooker-Feldman, as detailed in Point III of Plaintiff's Memorandum of Law [R-471-476], the District Judge jettisoned his adjudicative duty vis-a-vis the unconstitutionality of New York's attorney disciplinary law, as written, by claiming, with boiler-plate ease, that it was "inextricably intertwined" and "would necessarily involve direct, or at a minimum indirect, review of the propriety of...state court decisions" [R-17]. This, notwithstanding Feldman makes clear that lower federal courts have subject matter jurisdiction over constitutional challenges to court promulgated rules governing attorneys generally, which it viewed as not judicial, but legislative in nature. The Complaint's First Cause of Action [R-83-87] specifically challenges the Second Department's disciplinary court rules as unauthorized substantive law-making.

Feldman distinguishes the Rooker doctrine and holds it inapplicable to state court decisions involving bar rules of general application. Obviously, a general challenge normally emerges from a specific case involving an aggrieved attorney or applicant for admission, without which state defendants would doubtless raise an objection based on standing. Moreover, Feldman makes clear that a prerequisite to federal lower court subject matter jurisdiction is that the federal constitutional questions have first been raised in the state courts so as to afford them a first opportunity to interpret the state law and rules alleged to conflict with federal constitutional rights. As recognized by the District Judge [R-15], Plaintiff exhausted every available remedy in the state forum for review of her constitutional challenge to the state attorney disciplinary law, as written and as applied, including a Petition for a Writ of Certiorari to the U.S. Supreme Court.

This Circuit has acknowledged the prevailing confusion as to the meaning of "inextricably intertwined" in its recent decision, Moccio v. NYS Office of Court Administration, 95 F.3d 195, 198 (2d Cir. 1996), stating:

> "the Supreme Court has provided us with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not...The result has been inconsistency in the lower federal courts faced with challenges

based upon the Rooker-Feldman doctrine."

The extraordinary allegations of Plaintiff's Complaint provide this Circuit with a clear opportunity to explore and define the availability of federal redress when state courts utilize facially unconstitutional statutory and court rule provisions, which to the extent they provide due process safeguards, the state courts flout, for ulterior, politically-motivated reasons.

Moreover, it appears from the decisional law and texts dealing with the Rooker doctrine that there has been no recognition that at the time such doctrine was articulated in 1923, there was obligatory jurisdiction by the U.S. Supreme Court over decisions rendered by the highest state courts, holding valid a state law challenged as inconsistent with federal law, Stern, Gressman, Shapiro Supreme Court Practice, 6th Edition (1986), at 30, fn. 80. However, such obligatory jurisdiction was eliminated in 1925 as to "a final judgment...rendered or passed by the highest court of a state in which a decision could be had...where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution...or laws of the United States", Judiciary Act of 1925 (43 Stat. 936, 937). Plainly, from that time on the Rooker doctrine needed reformulation in light of the drastically changed circumstances as to the absolute right of review by the Supreme Court in such cases as involved state court decisions upholding state action as against asserted federal rights.

Moreover, today, the continued standard pretense that the U.S. Supreme Court is, in any practical sense, geared to review meritorious petitions for certiorari coming to it from highest state courts flies in the face of the statistical reality. In the 1994 Supreme Court term, when Plaintiff filed her Petition for a Writ of Certiorari [R-303], the Court had over 8,000 cert. petitions on its docket and accepted only 77 cases for such discretionary review. See, Statistical Sheet No. 28 of the U.S. Supreme Court, dated June 28, 1995.

It is noteworthy that the District Judge uses Plaintiff's Article 78 constitutional challenge as a bar to her federal action, without adjudicating the central issue raised by Plaintiff as to the fundamental constitutional violation, reflected by her Complaint, that the Second Department was disqualified from adjudicating a proceeding to which they were a named party and had an interest.

This glaringly contrasts with his decision in Rameau v. NYS Dept. of Health, 741 F.Supp. 68, 70 (1990), wherein the District Judge acknowledged:

> "...although a judgment in a prior Article 78 proceeding is not a bar to a subsequent federal civil rights action[41], the federal plaintiff is precluded from relitigating issues that were fully and fairly litigated..."

As detailed in Point II of Plaintiff's Petition for a Writ of Certiorari [R-331-334], the most fundamental component of due process, without which full and fair adjudication is impossible, is an impartial tribunal. This is so basic that the District Judge surely did not have to rely on the cases cited by Plaintiff for that self-evident proposition [R-332]. However, also identified therein [R-333], supported by the Second Department's own decision in Colin v. Appellate Division, First Dept., 3 A.D.2d 682, 159 N.Y.S.2d 99 (2nd Dept. 1957), citing Smith v. Whitney, 116 U.S. 167 (1886), is that there is no jurisdiction for judges in one Appellate Division to adjudicate Article 78 proceedings brought against judges of another Appellate Division because the historic genesis for such proceedings, codified by the common law writs of certiorari, mandamus, and prohibition, requires adjudication by a higher tribunal.

As pleaded in ¶178 of the Complaint [R-74], the Attorney General opposed transfer of Plaintiff's Article 78 proceeding from the Second Department and did so "without any legal authority".

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[41] The District Judge includes a pertinent footnote on this point:

> "The doctrine of claim preclusion, which bars relitigation of causes of action, does not apply where the initial forum did not have the power to award the full measure of relief sought in the subsequent litigation. See Davidson v. Capuano, 792 F.2d 275, 278 (2d Cir. 1986). Since damages for civil rights violations are not recoverable in an Article 78 proceeding, a judgment resulting from such proceeding will not bar a subsequent federal action seeking that relief..."

Defendants' Answer skipped over that material allegation [R-121], a fact specifically brought to their attention in Plaintiff's "Critique" [R-296], transmitted to the Attorney General's office on May 25, 1995 [R-178]. Defendants took no corrective steps. Consequently, their failure to deny that pivotal allegation can only be viewed as deliberate and must be deemed admitted under Fed.R.Civ.P. 8(d). Yet, just as Defendants cited no legal authority for an Article 78 proceeding to be adjudicated by the very judges whose unlawful and unconstitutional conduct is being challenged therein, so too the District Judge has provided no law and no interpretation permitting such monstrous subversion of the Article 78 remedy.

Thus may be seen that the District Judge's granting of summary judgment to Defendants rests on obliteration and misrepresentation of the material allegations of the Complaint, obliteration and misrepresentation of the explicit requirements of New York's attorney disciplinary law and the statutory provisions relating to Article 78, and upon absolutely no evidence whatever.

PETITIONER'S APPENDIX TO HER APPELLANT'S BRIEF, filed January 10, 1997 in the Second Circuit Court of Appeals

[Also annexed as Exhibit "A" to Petitioner's §372(c) misconduct complaint against the district judge]

APPENDIX

This Appendix demonstrates how the District Judge deliberately misrepresents the Complaint in his Decision by shearing from it those allegations of Defendants jurisdiction-less, due process-less, retaliatory conduct that appear in the very paragraphs of the Complaint he cites.

DECISION: Page 2 [R-5]

The Decision CITES ¶19 [R-30] that Judiciary Law §90(2) authorizes the Second Department to discipline attorneys, but OMITS the allegation of ¶19 that such disciplinary jurisdiction is limited by the express requirement of Judiciary Law §90(2) to attorneys "who are 'guilty of professional misconduct'".

DECISION: Page 3 [R-6]

The Decision MISREPRESENTS 22 NYCRR §691.4(e) [R-347-] by paraphrasing it -- most egregiously -- so as to omit the language of the rule that makes 22 NYCRR §691.4(e)(5) the exigency exception [R-348].

The Decision CITES ¶41-2 [R-36] that the Grievance Committee filed a report on July 31, 1989 with the Second Department based on complaints of two former clients, but OMITS the allegations of ¶42 [R-36] that such allegation was made "upon information and belief" since Plaintiff complaint was that she had never seen the July 31, 1989 report, that it was rendered *ex parte*, and that Casella and the Second Department had denied her all access to it. The Decision ALSO OMITS that portion of said allegation as stated that the Grievance Committee failed to comply with the pre-

petition written charges and hearing requirements of 22 NYCRR §691.4(e)(4) and (f) and that the exigency exception of 22 NYCRR §691.4(e)(5) was inapplicable [R-347-8].

The Decision CITES ¶55 [R-39] for the Second Department's December 14, 1989 Order authorizing prosecution of a disciplinary proceeding against Plaintiff, but OMITS the allegation of ¶55 [R-39] that the Second Department's December 14, 1989 Order was rendered *ex parte* and that the four-month lapse of time between it and the July 31, 1989 report was inconsistent with 22 NYCRR §691.4(k) [R-349]. ADDITIONALLY, it OMITS the relevant allegations of ¶¶56-60 [R-40-41] as to the violations of §691.4 [R-347-348] and due process reflected by the *ex parte* December 14, 1989 Order and the February 6, 1990 disciplinary petition based thereon.

The Decision CITES ¶59 [R-40] for the Grievance Committee's service upon Plaintiff of the February 6, 1990 disciplinary petition, but OMITS the due process violation alleged in ¶59 [R-40]: the February 6, 1990 petition was made entirely upon information and belief and that the verification rested not on the Grievance Committee's July 31, 1989 report, but upon the Second Department's *ex parte* December 14, 1989 Order. ALSO OMITTED are the due process allegation of ¶60 [R-40-41] that the February 6, 1990 petition did not annex or serve either the *ex parte* July 31, 1989 report or the *ex parte* December 14, 1989 Order upon her.

DECISION: Pages 3-4: [R-6-7]

The Decision CITES ¶66 [R-42] for the Grievance Committee's filing with the Second Department on May 8, 1990 of an Order to Show Cause, pursuant to §691.13(b)(1) [R-350], to direct a medical examination of Plaintiff. However, ¶66 [R-41] identifies that the Order to Show Cause was procured by Casella, *ex parte*, from a judge with a personal/political interest, as he was alleged to be "the principal architect and beneficiary of the Deal..." [R-37: ¶47] that Plaintiff had challenged in *Castracan v. Colavita*. ALSO OMITTED are the due process allegations of ¶67, 68, and 69 [R-42-43] that Casella's May 8, 1990 Order to Show Cause was unsupported by the petition required by §691.13(b)(1) [R-350], that it made no claim that it was related to the February 6, 1990 petition

against Plaintiff, and that it was, in fact, unrelated and not "an underlying proceeding to such application".

DECISION: Page 4 [R-7]

The Decision INCORRECTLY CITES ¶93 [R-50-51] for the Second Department's October 18, 1990 Order granting the Grievance Committee's motion that Plaintiff be medically examined, when, in fact, such paragraph refers to the granting of the June 14, 1991 Order. The correct paragraphs relating to the October 18, 1990 Order, ¶¶78-79 [R-45-45], reflect the due process infirmities, *inter alia*, the seven material errors in that Order, including its false and misleading reference to an "underlying" disciplinary proceeding, all of which are identified in allegation numbered 79, BUT COMPLETELY OMITTED from the Decision.

The Decision INCORRECTLY CITES ¶93 [R-50-51] for its false statement that "Sassower refused to comply with the October 18, 1990 Order". The Complaint explicitly denied Casella's claimed refusal, and, moreover, specifically identified that her January 28, 1991 Order to Show Cause sought sanctions against Casella for his unethical conduct and that she had shown therein that the October 18, 1990 Order was not "a lawful demand", as required by §691.4(l)(1)(I) [R-49: ¶89].

The Decision also INCORRECTLY CITES ¶93 [R-50-51] for the Grievance Committee's January 25, 1991 Order to Show Cause for Plaintiff's immediate suspension for "failure to comply with the October 18, 1990 order." ¶93 [R-50-51] has nothing whatever to do with the January 25, 1991 Order to Show Cause and the second paragraph citation given by the Decision, ¶85, specifically identifies Casella, not the Grievance Committee, as having filed the Order to Show Cause, which, as alleged in ¶86, failed to allege that her was authorized by the Committee; and further alleges the specific rule provision under which he brought such Order to Show Cause, i.e., §691.4(l)(1)(I) [R-349] -- which the Decision OMITS. Additionally ¶85 [R-48] alleges, but the Decision OMITS, that Plaintiff brought her own Order to Show Cause, dated January 28, 1991, for vacatur of the October 18, 1990 Order as jurisdictionally void, as well as in opposition to Casella's Order to Show Cause. ALSO OMITTED entirely from the Decision are the allegations of

¶¶86, 87, 88 [R-48-49] that Casella's January 25, 1991 Order to Show Cause was legally insufficient and factually perjurious, for which Plaintiff sought sanctions and disciplinary action against Casella from the Second Department.

The Decision INCORRECTLY CITES ¶¶85, 93 [R-48, R-50] that the Second Department's June 14, 1991 order [R-96] was made pursuant to 22 NYCRR §691.13(b)(1) [R-350] (relating to disability proceedings to determine alleged incapacity) and that it granted Grievance Committee's motion and "thereby suspended Sassower's license to practice pending her compliance with the October 18, 1990 order". This is a flagrant falsehood, as shown from the face of the Second Department's June 14, 1991 Order -- annexed to the Complaint as Exhibit "A" [R-96], in that: (a) such Order suspended Plaintiff pursuant to 22 NYCRR §691.4(l) [R-349], the provision under which Casella, NOT the Grievance Committee brought the January 25, 1991 Order to Show Cause, as ¶85 alleges [R-48]; and (b) it suspended her unconditionally and not "pending" anything. Moreover, ¶93 [R-50] specifically alleges that the Second Department's June 14, 1991 Order [R-96] was "without any findings or statement of reasons therefor", all of which the Decision OMITS.

The Decision CITES ¶98 [R-52] for the Second Department's July 15, 1991 Order denying her motion to vacate or modify[1] its June 14, 1991 Suspension Order, but OMITS the further allegation of ¶98 that such denial was "without reasons" and that Plaintiff's motion also sought recusal of the Second Department as warranted by the appearance that it was retaliating against Plaintiff for expressing her First Amendment rights to speak out against demonstrated judicial misconduct.

DECISION: Pages 4-5 [R-7-8]

The Decision CITES ¶107 [R-54] for Plaintiff's July 19, 1991 motion for leave to appeal to the Court of Appeals was on the

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[1] The Court's reference to Appellant's motion to vacate/modify June 14, 1991 order is the first time the Opinion cites any action by Appellant in the disciplinary proceedings against her.

ground that the Second Department had failed to comply with the requirements of N.Y. Comp. Codes R. & Regs. tit. 22, §691.4 and related case law, thereby depriving her of her constitutional right to due process", but OMITS the further specific allegation therein as to the unlawfulness of its October 18, 1990 [Order], procured by Casella without a petition, in violation of 22 NYCRR §691.13(b) [R-350].

DECISION: Page 5 [R-8]

The Decision CITES ¶117 [R-57] for the Court of Appeals September 10, 1991 denial of Plaintiff s motion for leave to appeal the Suspension Order, but OMITS the further allegation of ¶117 as to the Court of Appeals' dismissal "the following month" of the appeal taken from the dismissal of the Election Law case of *Castracan v. Colavita.*

The Decision CITES ¶127 [R-60] for issuance by the Grievance Committee of an April 9, 1992 supplemental petition, but OMITS the allegations of ¶127 that it was the Second Department Order authorizing same which was *ex parte* and *sua sponte* and that such Order "overrode Defendant Grievance Committee's unanimous vote" not to prosecute the complaints on which it was based, and ALSO OMITS the due process infirmities thereof, elaborated upon in ¶¶125, 126, [R-59-60] as well as ¶128, 129, 130 [R-60-61].

The Decision CITES ¶134 [R-62] for Plaintiff's June 16, 1992 motion to vacate June 14, 1991 suspension Order on the ground that the supervening Court of Appeals decision in *Russakoff* [R-529] required a post-suspension hearing and factual findings on the record, but OMITS ¶134 allegations that she had no such hearing and the Suspension Order made no findings, and the other grounds upon which Plaintiff sought vacatur based upon lack of jurisdiction and the deliberate fraud, misrepresentation, and other unethical practices of Casella, as theretofore pleaded.

The Decision CITES ¶135 [R-62] for Plaintiff's June 18, 1992 motion to vacate April 1992 Supplemental Petition, as well as the February 1990 Petition, for failure to comply with Judiciary Law §90 and 22 NYCRR §691.4(e)(4), (f), and (h) [R-347-8], but OMITS the allegation of ¶135 that these violations are jurisdictional

The Decision CITES ¶143 [R-64] that the Second

Department's July 31, 1992 order denied Plaintiff's motion to vacate its Suspension Order and all other relief, but OMITS ¶143's allegation that such denial of Plaintiff s *post-Russakoff* motion [R-529] was made without reasons, with imposition of costs, and other requested denied included Plaintiff's motion for leave to appeal to the Court of Appeals.

The Decision CITES ¶144 [R-64] for Plaintiff's motion to appeal of right to the Court of Appeals on the ground that her constitutional equal protection right had been denied, but OMITS the specific allegations of ¶144 relating to the *Russakoff* case, and further that the lack of provision for hearing rendered interim suspension orders unconstitutional.

The Decision CITES ¶145 [R-65] for the Court of Appeals' November 18, 1992 Order dismissing Plaintiff's appeal for lack of finality, but OMITS the allegation of ¶145 that her "interim" suspension was in all respects *a fortiori* to that in *Russakoff* [R-529].

DECISION: Pages 5-6: [R-8-9]

The Decision CITES ¶¶151 and 153 [R-67] for the Grievance Committee's January 28, 1993 disciplinary petition based on five sua sponte charges, but OMITS the allegation of ¶151 that the petition was entirely on information and belief, was based on an *ex parte* November 12, 1992 Order of the Second Department, based on acts allegedly set forth in the Grievance Committee's *ex parte* July 8, 1992 report, and OMITS the allegation of ¶153 as to the context of judicial misconduct and political machinations from which those charges arose.

DECISION: Page 6 [R-9]

The Decision CITES ¶162 [R-69] for the Grievance Committee's issuance of the March 25, 1993 disciplinary petition and reserves for a footnote the allegations of ¶162 and ¶155 that the jurisdictional service requirements of Judiciary Law §90(6) [R-351] were not complied with in serving that petition or the January 28, 1993 disciplinary petition, which it then presents without the specificity contained in such pleaded allegations.

As to both petitions, the Decision OMITS the specific

allegations of ¶162 and ¶155, showing not only the lack of personal jurisdiction over Plaintiff resulting from the Grievance Committee's violation of the personal delivery requirement of Judiciary Law §90(6) [R-351], but also the fraudulent and egregiously improper manner of service.

The Decision CITES ¶164 [R-70], ¶172 [R-72] for Plaintiff's April 14, 1993 motion to vacate for lack of personal jurisdiction for improper service, but the allegation of ¶164 is not limited to lack of personal jurisdiction, as may be seen from ¶162 [R-69], ¶163 [R-70].

The Decision CITES ¶166 [R-70] for Plaintiff's Article 78 proceeding against various Defendants, but OMITS the specific allegation therein contained that such proceeding was precipitated by Referee Galfunt's continued refusal to rule on Plaintiff's jurisdictional objections to Defendants' February 6, 1990 petition, based on lack of compliance with pre-petition requirements of §691.4(e) and (f) [R-347-8].

DECISION: Page: 7 [R-10]

The Decision CITES ¶171 for the Second Department's May 24, 1993 denial of Plaintiff's separate motions to vacate the two unrelated January 25, 1993 and March 28, 1993 disciplinary petitions, but OMITS the allegations of ¶171 that the motions were for lack of personal jurisdiction and the denial was by one order, "without reasons".

The Decision CITES ¶172 [R-72] for Plaintiff's June 14, 1993 motion to reargue and renew the Second Department's May 24, 1993 Order denying her motions, but OMITS the specific allegations therein as to the basis thereof and the pleaded disregard by the Second Department of the personal delivery requirement of Judiciary Law §90(6) [R-351] and the appearance of impropriety of the Second Department's adjudicating Plaintiff's motion contesting personal jurisdiction "while it was being sued by her in her pending Article 78 proceeding". [*see* cert pet., at R-315]

The Decision CITES Plaintiff's cert petition for Defendants' motion to dismiss the Article 78 proceeding, but OMITS ¶168 [R-71] of the Complaint, which identifies Defendants' motion as conceding that the pre-petition requirements of §691.4 had not been complied

with", but that the Attorney-General had falsely argued that compliance was not required because the *ex parte* July 31, 1989 report ... 'implicitly relied' on the exigency exception under §691.4(e)(5) [R-348].

The Decision CITES ¶173 [R -72] for Plaintiff's cross-motion to amend her Article 78 petition to plead "a pattern of abusive and harassing conduct", but OMITS ¶173's further allegation that such conduct was by Defendants "acting without or in excess of jurisdiction."

The Decision CITES ¶¶182, 183, and 185 [R-75-6], as well as Plaintiff's Cert Petition, for the Second Department's September 20, 1993 Order granting Defendants' motion to dismiss Plaintiff s Article 78 petition "on the merits'" and denying Plaintiff's cross-motion, but OMITS the specific allegations therein that it knew that Plaintiff s jurisdictional challenge could not be addressed in "the underlying disciplinary proceeding" and that the Second Department was not an impartial tribunal.

The Decision CITES ¶189 [R-77] for Plaintiff 's November 19, 1993 motion to dismiss the three disciplinary petitions against her but OMITS the allegation therein that such motion was made pursuant to the September 20, 1994 Order that her jurisdictional objections could be addressed in "the underlying disciplinary proceeding" and that the motion sought discovery of the *ex parte* reports of the Grievance Committee and appointment of a special prosecutor to investigate the prosecutorial and judicial misconduct complained of by Plaintiff.

The Decision CITES ¶190 [R-70] that Plaintiff's November 19, 1993 dismissal motion sought transfer on the ground that Second Department knew that the disciplinary proceedings against [Plaintiff] were "somehow" void, but OMITS that such allegation was documented by specific record references which also showed that the proceedings were "factually baseless, and resting on false and perjurious affirmations of Defendant Casella."

DECISION: Pages 7-8 [R-10-11]

The Decision CITES ¶198 [R-79] and Plaintiff's cert petition (A-93, A-94) [435-436] for Plaintiff's appeal to the Court of Appeals from the Second Department's dismissal of her Article 78

Petition and dismissal of her cross-motion, but OMITS reference to ¶199 [R-80], referring to its fraudulent and criminal conduct, and further alleging that Plaintiff showed her legal entitlement to appellate review by the Court of Appeals in matters where the Appellate Division has original jurisdiction. It further OMITS reference to ¶209, showing that the dismissal was on jurisdictional grounds, and not on the merits of her appeal.

DECISION: Page 8 [R-11]

The Decision CITES ¶201 [R-80] for the Second Department's January 28, 1994 Order denying Plaintiff's November 19, 1993 dismissal/transfer motion, but OMITS the allegations therein that such denial was without reasons and that the Order threatened her with contempt should she make further motions without prior judicial approval. It also OMITS ¶191 [R-77] that Plaintiff's motion was unopposed by any evidentiary proof, probative affidavit, or legal authority from Casella.

The Decision CITES ¶209 [R-82] for the Court of Appeals' May 12, 1994 dismissal of her appeal from the Second Department's dismissal of her Article 78 petition and denial of her cross-motion, but OMITS the allegation therein that it made no mention of Defendants' unethical conduct and the lack of an impartial tribunal in the entity known as Defendant Second Department .

DECISION: Page 9: [R-12]

The Decision CITES ¶¶210-211 [R-83] for Plaintiff's challenge to the constitutionality of 22 NYCRR §691.4(l)(1) and (2), as written and as applied, but OMITS the allegation therein that the New York Court of Appeals recognized in *Nuey* that there is no statutory authority in Judiciary Law §90 for interim suspension orders.

The Decision CITES ¶¶236, 247 [R-88; R-90] that Defendants acted under color of state law to wilfully and maliciously violate Plaintiff s constitutional rights, combining her Second and Third Causes of Action, but OMITS the pertinent allegations in ¶238 [R-88] in the Second Cause of Action and ¶248 [R-91] in her Third Cause of Action based on conspiracy that Defendants deprived her of

First Amendment rights to freedom of speech, freedom to petition for redress of grievances... and that they conspired to silence her as a voice speaking out against judicial corruption by judges and lawyers in the Second Judicial Department of the State of New York .

PETITIONER'S RECUSAL/SANCTIONS MOTION, filed April 1, 1997 in the Circuit Court of Appeals

THIS COURT SHOULD *SUA SPONTE* RECUSE ITSELF SO THAT THIS MATTER IS DECIDED BY A JUDGE OUTSIDE THE CIRCUIT

6. At the outset, I submit that this Circuit should recuse itself sua sponte. My recusal request is not only based on the politically sensitive nature of the case, involving powerful state public officials, including high-ranking state court judges with whom judges of this Circuit have personal and professional relationships, but because of the pre-existing animus between this Circuit and my former husband, George Sassower, who has over and again sued judges of this Circuit, filed numerous misconduct complaints against its judges, and widely publicized his criticism of the Circuit as criminally corrupt and "unfit for human litigation". Indeed, this Court has characterized Mr. Sassower as an "abusive litigant for years"[3] for so doing and prohibited him from filing any papers in the Second Circuit unless leave of Court is first obtained. See, In re Martin-Trigona, #93-5008 (1993); In re George Sassower, 20 F.3d 42 (1994).

7. Should this Circuit not recuse itself sua sponte, as requested, based upon facts concerning George Sassower as to which it has superior knowledge to my own, as well as of the facts hereinafter set forth, I will make a formal motion, to include copies of all the relevant documents to which I refer herein.

8. Unfortunately for me, I have direct, first-hand knowledge of this Circuit's intense animus toward George Sassower, having been its innocent victim in the period in which he was "filing an avalanche of litigation" against judges within the ambit of the Second Circuit (NYLJ, fn. 3, supra). In 1992, in an appeal of an

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[3] This characterization of Mr. Sassower, excerpted from In re Martin Trigona, #93-5008 (1993), appeared on the front page of a November 9, 1993 New York Law Journal article about the decision, under the title "'Vexatious Litigants' Procedure Held Lawful".

unrelated civil rights action in which I, along with my daughter, were the plaintiffs, Sassower v. Field, #91-7891, now Chief Judge Jon Newman authored a decision, 973 F.2d 75, sustaining under "inherent power" a $100,000 sanctions award against us. The record before him showed a pattern of deliberate misconduct, including falsification of the record by the District Judge, whose sanction award was without a shred of factual, legal, or moral basis, was rendered without a hearing, and which directed the $100,000 award monies go to fully-insured defendants for whom it was a "windfall" -- not reimbursement[4]. This Circuit not only denied my Petition for Rehearing and Suggestion for Rehearing En Banc of Judge Newman's fraudulent decision, in which it, thereby, became complicitous, but, last year, when I filed a §372(c) misconduct complaint against then Chief Judge Newman, based on his decision in Sassower v. Field, in which I requested transfer to another Circuit by reason thereof, the Circuit refused to recuse itself. The result was that my fully documented, meritorious §372(c) misconduct complaint (#96-8511), which was supported by a copy of my aforesaid Petition for Rehearing En Banc, as well as my cert papers to the U.S. Supreme Court, was dumped by Acting Chief Judge Amalya Kearse[5]. The Judicial Council of the Second Circuit thereafter adhered to her

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[4] Prior to perfecting the appeal, I made a motion to the Circuit to vacate the $100,000 sanction award based on a jurisdictional objection that the insurer, rather than the defendants were the "real parties in interest", but that the insurer had not only made no claim to the monies before the District Judge, but had expressly declined to intervene. That motion was deferred to the panel hearing the appeal", which, thereafter consisted of Judge Newman, as Presiding Judge, together with Judge Edward Lumbard and Judge Ralph Winter. The decision they rendered (per Judge Newman) ignored my "real party in interest" objection entirely -- much as it did every other issue raised on appeal. See footnote 7 herein. Judge Winter is to succeed Judge Newman as this Circuit's Chief Judge when he steps down later this year.

[5] Judge Kearse did not recuse herself, albeit, inter alia, the obvious "appearance of impropriety" from the fact that Judge Newman had previously publicly proposed her for nomination to the U.S. Supreme Court, replacing the embattled nominee, Clarence Thomas, in an October 10, 1991 New York Times Op-Ed piece he authored: "A Replacement for Thomas".

dismissal. This, notwithstanding my Petition for Review to the Judicial Council comprehensively demonstrated that Judge Kearse's dismissal was over and again factually and legally insupportable.

9. Although totally unrelated to the instant action, the case of Sassower v. Field apparently is deemed sufficiently relevant by the Court to the instant action for the General Docket herein to include a string of five appellate docket numbers pertaining to it as a "NOTE" (Exhibit "E", p. 3)[6]. #91-7891 is the perfected appeal.

10. It must be noted that the 1993 docket numbers #93-7363 and #93-7311 relate to two appeals in Sassower v. Field that were not perfected as a result of the misconduct of Staff Counsel Frank Scardilli[7]. That misconduct, which included Staff Counsel Scardilli's harassment, coercion, and conduct severely prejudicial to my rights, including altering a signed stipulation, was made the subject of an extensive and fully-documented formal misconduct complaint in January 1994, which characterized his conduct as carrying out the Second Circuit's retaliatory goals.

11. Second Circuit Executive Steven Flanders covered up Staff Counsel Scardilli's misconduct by dismissing my documented complaint against him. This encouraged Mr. Scardilli to involve himself on this appeal and prejudice my rights herein. However, immediately upon my discovery of Mr. Scardilli's involvement, I objected to his improper actions. Mr. Scardilli recused himself, rather than face a formal application, with copies of the relevant documents annexed.

12. As detailed in my §372(c) judicial misconduct complaint against Chief Judge Newman, I believe Judge Newman was in some behind-the scenes way involved in the unlawful suspension of my law license from the Southern District of New

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[6] There is no correlative listing of every case in which Appellees have been sued for official misconduct in a §1983 action or otherwise, which unlike Sassower v. Field, would be relevant to the issues raised herein.

[7] The issue on those appeals concerned the refusal of the fully-insured defendants, who were the beneficiaries of the $100,000 sanctions award against me, to give said monies to the insurer, who -- after Judge Newman's decision, which ignored my objection as to defendants' "standing" -- then popped up to claim them.

York, in violation of Rule 4 of its own Rules [R-906-907]. That Rule, which I expressly invoked, explicitly entitled me to a hearing, inasmuch as I demonstrated that my state court suspension had deprived me of due process in that it was issued without written charges, without a hearing, without findings, without reasons, and without any right of appeal. Nonetheless, now Chief Judge of the Southern District Thomas Griesa, without affording me a hearing, as requested in letters to him [R-562; R-568; R-571], signed an order dated February 27, 1992 [R-558], the day before the oral argument of my appeal in Sassower v. Field, suspending my license in the Second Circuit based on my due process-less state court suspension.

13. Thereafter, in the context of this litigation, when I complained to Chief Judge Griesa concerning the District Judge's "manifest bias [which] has caused him to run amok" and requested him to exercise his power of supervision, supplying him with copies of both my recusal and reargument motions [R-730, R-743], he again ignored my letters [R-853, R-901] -- including the final one [R-902-903], wherein I requested his recusal. In such letter, I pointed out that his inaction reflected his own conflict-of-interest inasmuch as one of the issues before the District Judge was his unlawful suspension of my federal law license[8] (Br. 3).

14. It is obvious that the District Judges of the Southern District have engaged in the demonstrably unlawful conduct that they have precisely because they know they can get away with it. This is because it advances a retaliatory goal of this Circuit to destroy George Sassower and anyone connected with him. This is what happened in Sassower v. Field, where the District Judge trampled on my rights and those of my daughter, and the Second Circuit applauded the travesty, with its own monstrous "inherent power" embellishment, secure in the belief that this Court would provide

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[8] The papers relating to the constitutionally violative suspension of my federal law license are part of the record herein [R-558-572] -- being part of my Order to Show Cause, with TRO, which sought relief including "such steps as may be required to vacate the February 27, 1992 order of this Court (per Thomas Griesa, J.) [R-558-559] suspending my license to practice law in the District" [R-489].(See, 502-503].

another cover-up affirmance.

15. This Circuit and the public at large are aware of my written and oral testimony to numerous bodies concerning this Circuit's retaliation against me, among them, the National Commission on Judicial Discipline and Removal (7/14/93), the Long-Range Planning Committee of the Judicial Conference of the United States (12/9/94), and the Second Circuit's own Task Force on Gender, Racial, and Ethnic Fairness in the Courts (11/28/95) [R-890-900].

16. The Attorney General has been on notice since shortly after issuance of Staff Counsel Scardilli's Scheduling Order last July that I intended to seek the Court's recusal and transfer of this appeal to another Circuit. Such notice was also given at the November 8, 1996 Pre-Argument Conference, at which the basis for such request was discussed before Staff Counsel Bass.

PETITIONER'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *IN BANC*, filed September 24, 1997 in the Second Circuit Court of Appeals

INTRODUCTION

This petition presents the Circuit with a transcendingly important issue: the integrity of the judicial process. The question presented is whether -- and to what extent -- appellate review and "peer disapproval" are "fundamental checks" of judicial misconduct, as claimed by the National Commission on Judicial Discipline and Removal in its 1993 Report – and whether a remedy for such judicial misconduct exists under 28 U.S.C. §372(c). This Circuit's answer will demonstrate whether judicial discipline should be reposed, as it presently is, in the Circuit[1].

At issue is the as-yet unredressed official misconduct by the District Judge, whose decision [R-4] was shown on the instant appeal to be factually fabricated, fraudulent, and the product of "pervasive bias", as well as the official misconduct of the three-judge appellate panel ["the panel"], whose not-for-publication, no-citation Summary Order and Decision (Exhibit "1") never once refers to the record before the District Judge and fails to make any adjudication of the District Judge's bias, the sole overarching issue raised by Appellant in her Brief. Nor did the panel adjudicate its own disqualifying bias -- which issue Appellant asserted at the time of her five-minute oral argument, from which she was cut off, mid-sentence, by the panel's Presiding Judge, Dennis Jacobs[2]. Like the District Judge's decision

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[1] This Circuit's answer will be part of a formal presentation by the Center for Judicial Accountability, Inc. to the House Judiciary Committee to remove federal judicial discipline from the federal judiciary, as described in "Without Merit: The Empty Promise of Judicial Discipline" by E.R. Sassower, Massachusetts School of Law: The Long Term View, Vol. 4, No 1, pp. 90-97. (Annexed as Exhibit "A" to Appellant's separately-filed recusal/vacatur motion, See p. 15 infra).

[2] This Circuit's practice is not to inform parties of the identity of the appellate panel judges until noon of the Thursday of the week before oral

on which it relies, the panel's decision is factually fabricated, fraudulent, and prima facie evidence of its actual bias.

[p. 2] The panel's decision, purportedly an "affirmance", expressly does not address any of the District Judge's dispositions of the motion-submissions before him (at 3). This includes the District Judge's sua sponte and without notice conversion of Defendants' dismissal motion to one for summary judgment in their favor, based on non-existent "voluminous" affidavits of Defendants. Instead, the panel, sua sponte and without notice, dismisses Appellant's Complaint -- purportedly on the pleading[3] -- for lack of subject matter jurisdiction under Rooker-Feldman. At the same time, it "affirms" the Judgment [R-2], which dismissed the Complaint by summary judgment to Defendants.

The impropriety of sua sponte, without notice dispositions has been explicitly condemned by Presiding Judge Jacobs himself in Pinaud v. County of Suffolk, 52 F.3d 1139, 1160 (1995), where he wrote:

> "...it would have been improper for the district court to grant summary judgment on any matter, sua sponte, and without notice to the non-moving party. See Fed.R.Civ.P. 56(c); Otis Elevator Company v. George Washington Hotel Corp., 27 F.3d 903, 910 (3d Cir. 1994)."

Without explanation, Presiding Judge Jacobs has not applied that basic due process standard in Appellant's case -- even in the face of the decisional law cited in Appellant's uncontroverted Brief[4]

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argument. Only then did Appellant learn the panel would consist of Dennis Jacobs, as Presiding Judge, and Judges Thomas Meskill and Edward Korman.

[3] In fact, the panel goes outside the pleading, since Appellant's cert petition, referred to in its footnote 1 (at p. 4), is not part of the Complaint [R-22-100], which was filed and served before the cert petition was even written (Br. 11-12)

[4] Defendants' Appellees' Brief did not deny or dispute the factual recitation and legal argument set forth in Appellants' Brief. Indeed, it never

showing that the District Judge's sua sponte and without notice granting of summary judgment to Defendants had to be reversed, on that basis alone, as a matter of law (Br. 57-59; Reply Br. 21).

Among the motion-submissions before the District Judge that the **[p. 3]** panel does not address is Appellant's voluminously-supported application for summary judgment, with Rule 3(g) Statement [R-168-487]. The District Judge's appealed-from decision [R-4] denied that application, without discussion. By such summary judgment submission, Appellant substantiated the allegations of her Verified Complaint -- allegations that precluded dismissal on the pleadings based on Rooker-Feldman, to wit, that the state judicial forum is permeated with politically-motivated bias, has rendered jurisdiction-less, lawless and fraudulent orders as part of a long-standing, retaliatory vendetta against Appellant -- all without findings and reasons -- and that New York's attorney disciplinary law is facially unconstitutional. Because Defendants failed to meet their burden to come forth with **any** evidentiary or legal opposition [R-626-642]-- even after being improperly relieved of their default in responding -- Appellant was entitled to summary judgment in her favor, as a matter of law (Br. 61-64).

In crafting its "affirmance" decision, the panel omits all allegations of Appellant's Complaint that vitiate a Rooker-Feldman defense, as well as the state of the record. It then knowingly misapplies the Rooker-Feldman doctrine by whipping out its stock "boiler-plate" verbiage, uncorrelated to the Complaint's allegations, the evidence, and the law cited by Appellant[5].

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even referred to Appellants' Brief. This was pointed out by Appellant's Reply Brief (at 2), which sought sanctions against Defendants for their bad-faith and frivolous opposition to the appeal, as to which the Circuit panel's decision is also silent.

[5] See, inter alia, Reply Br. 8, citing Allen v. McCurry, 462 U.S. 90, 95 (1980), Haring v. Prosise, 462 U.S. 306, 313 (1983), Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), vacated on other grounds, 91 L.Ed.2d 56, cited with approval by Stone v. Williams, 766 F. Supp. 158, 162 (S.D.N.Y. 1991), aff'd 970 F2d 1043 (1992), cert denied, 124 L.Ed.2d 243, Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982).

By way of "window dressing", the Circuit panel (at pp. 3-4) acknowledges that review de novo is the standard for reviewing "the district court's determination that, as a matter of law, jurisdiction did not exist ", citing Moccio v. New York State Officers Association, 95 F.3d 195, at 198 (1996). However, from the decision, it is apparent that the panel denied Appellant her legal right to de novo review. This is not only **[p. 4]** reflected by its complete failure to cite to the factual record before the district court -- including any of the Complaint's allegations -- but because it affirmatively makes false and misleading statements, as comparison with the record makes plain. Thus, to defeat Appellant's constitutional challenge to New York's attorney disciplinary, as applied to her, the panel states "she now is 'effectively seek[ing] review of judgments of [the] state courts,' Moccio 95 F.3d at 197, judgments that have deprived her of her license to practice law..." (at p. 4). Had the panel examined the record, de novo, it would have known that there are no state court judgments that deprived Appellant of her law license -- not even one![6]

The gravamen of Appellant's Verified Complaint is that her law license was suspended by an unconditional and indefinite "interim" order -- **not** by a final judgment. It is that order [R-96-97] and the court rule under which it was issued -- 22 NYCRR §691.4(l) -- that Appellant seeks through federal intervention to declare repugnant to the Constitution of the United States. Conspicuously, the panel does not identify the rule under which Appellant was suspended -- which the District Judge's decision had misidentified [R-7] -- nor does it cite New York's controlling case law, Matter of

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[6] The only state court judgment that exists in the record arises from Appellant's post-suspension Article 78 proceeding against Defendant Second Department. As highlighted in Appellant's Brief (at 10, 74-75) and Reply (at 27-31), Defendant Second Department's judgment in that Article 78 proceeding [R-362] -- which the panel does not cite -- is not an adjudication responsive to the merits, was alleged by the Complaint to be a fraud [R-75: ¶182; R-77: ¶¶189-191; R-80-81: ¶¶291-202], and is a jurisdictional nullity because, by decisional law cited in the record [R-333], Defendant Second Department was legally disqualified and without jurisdiction to render it, Colin v. Appellate Division, First Department, 3 A.D.2d 682, 159 N.Y.S.2d 99 (2d Dept. 1957), citing Smith v. Whitney, 116 U.S. 167 (1886).

Nuey, 61 N.Y.2d 513 (1984) [R-528], and Matter of Russakoff, 72 N.Y.2d 520 (1992) [R-529], which recognized §691.4(l) to be statutorily unauthorized and, on its face, constitutionally infirm in failing to provide for a prompt post-suspension hearing (See Br. 56)

[p. 5] In citing Appellant's argument that her facial challenge to the New York attorney disciplinary law, "'do[es] not require review of any state court decisions.' Appellant's Brief at 71" -- which the panel does not deny -- it has clipped the quoted sentence, both beginning and end. The full sentence, which is even more powerful, reads:

> "Clearly, where, as at bar, state court disciplinary rules are facially unconstitutional and not based upon state statutory authority, as Russakoff and Nuey reveal, the declaratory judgment relief sought in Plaintiff's First Cause of Action, does not require review of any state court decisions in Plaintiff's case."

This is a dispositive statement, bearing out precisely what the Supreme Court held in District of Columbia v. Feldman, 460 U.S. 462 (1983), and further reflected by Razatos v. Colorado Supreme Court, 746 F.2d 1429 (1984), where the Tenth Circuit ruled that when the district court "need only look at [the rule] as promulgated, and as construed by state case law", the constitutional challenge conforms to Feldman and does "allow district court subject matter jurisdiction" over a challenge to attorney disciplinary rules, as written, at 1434. The fact that the panel is silent as to the good and sufficient legal arguments raised in the subsequent pages of Appellant's Brief (at 71-75) relating to Rooker-Feldman[7] can only be seen as an implied admission of the merit of the arguments set forth as to the inaptness of Rooker-Feldman as barring this action. The same can be said with respect to all of Appellant's other good and

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[7] Notwithstanding the panel purports that Appellant, on appeal, has claimed that she did not raise all her constitutional challenges previously, this is untrue. Moreover, the use of "we think" (at p. 4) as a basis for depriving Appellant of her day in court further discloses the panel failed to undertake de novo review.

sufficient arguments in Brief (at 31-70), as to which the panel is also silent.

Finally, in order to turn back Appellant's general challenge to the constitutionality of the attorney discipline law, the panel invokes unspecified "contemporary preclusion principles" (at p. 5), whose applicability it does not demonstrate by citation to the factual record, **[p. 6]** case law, or by discussion of the fundamental prerequisites, without which preclusion cannot be invoked: There must be (1) a final judgment[8], with subject matter and personal jurisdiction over the parties; (2) a full and fair opportunity to litigate; and (3) an adjudication responsive to the issues. The absence of all these prerequisites at bar is evident from the Complaint -- which the panel purports to have examined -- a pretense exposed by its failure to cite to any of its allegations or to identify the supposedly preclusive judgment -- since it knows there is none.

Appellant's Reply Brief (at 28, 9) pointed out that none of the subject state court orders make findings -- let alone the essential findings as to jurisdiction, due process, and the impartiality of the state tribunal -- all challenged by Appellant -- and that even the District Judge's decision made no finding that Appellant had "a full and fair opportunity to litigate". Yet, the panel's decision (at p. 5) rests on the District Judge's decision [R-4] and, again, demonstrates that despite Appellant's entitlement to de novo review of the district court's determination that jurisdiction did not exist, it made no such review.

FACTUAL BACKGROUND: THE UNEXPURGATED VERIFIED COMPLAINT

This appeal arises out of a §1983 civil rights action for serious constitutional violations by state officials, wherein Appellant challenges New York's attorney disciplinary law, as written and as

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[8] Judges Meskill and Jacobs are familiar with the "valid final judgment" prerequisite for claim preclusion, as may be seen from Central Hudson Gas & Electric Corporation v. Empresa Naviera Santa S.A., 56 F.3d 359, 1995 U.S. App. LEXIS 11654; 1996 AMC 163, authored by Judge Meskill, with Judge Jacobs on the panel.

applied to her. As hereinabove stated, none of the innumerable violations of Appellant's rights, as alleged in the Verified Complaint, are identified by the panel's decision (Exhibit "1"), which also does not identify the basis for Appellant's constitutional challenge to the attorney disciplinary **[p. 7]** law[9]. Likewise, these were obliterated from the District Judge's decision -- a fact highlighted in Appellant's Brief (at 4-11).

The material allegations of the Verified Complaint, purposefully concealed by the two federal court decisions in this case, are allegations of a shocking and heinous nature, inter alia, that on June 14, 1991, Defendant Second Department issued an "interim" Order suspending Appellant's law license "immediately, indefinitely, and unconditionally":

> "without notice of formal charges, without a hearing, without a finding of probable cause, or any other findings, administrative or judicial, and without any jurisdiction whatsoever...[and that it] knew such Order to be unlawful and fraudulent and that it was being rendered for political, personal, and private ulterior motivations, totally outside the scope of their judicial/official duties for the sole purpose of discrediting, defaming, and destroying Plaintiff to cause her to cease her activities in exposing judicial corruption." [R-24]

Nearly 70 allegations of the Verified Complaint relate to the political context in which Defendant Second Department issued and thereafter perpetuated the lawless, retaliatory suspension of Appellant's license (See, Br. fn. 3). These include that the June 14, 1991 "interim" suspension Order was served upon Appellant the day before the last day to file the notice of appeal to the New York Court

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[9] Annexed as Exhibit "N" to Appellant's incorporated-by-reference recusal/vacatur motion (pp. 15 infra) is an Appendix identifying the multitudinous respects in which the panel's decision has falsified, misrepresented, and suppressed the material allegations of the Verified Complaint and the proceedings herein. A similar Appendix, relating to the District Judge's decision, is annexed to Appellant's Brief.

of Appeals in a public interest Election Law case in which Appellant, as pro bono counsel, was challenging the manipulation of state court judgeships by the leaders of both major political parties and their judicial nominees, and that prior thereto, on the day before Appellant was scheduled to orally argue the case before the Appellate Division, Third Department, Defendant Second Department issued an October 18, 1990 Order directing her to be medically examined to determine her mental capacity.

[p. 8] The Verified Complaint alleged that both these Orders were factually and legally baseless, fraudulent, and violative of her First, Fifth, and Fourteenth Amendment rights, as well as jurisdictional and due process requirements, explicitly mandated by the very court rules under which they purportedly were issued, e.g., although those rules call for a petition to commence a plenary proceeding thereunder, neither the Order to Show Cause seeking Appellant's medical examination pursuant to 22 NYCRR §691.13(b)(1), nor the Order to Show Cause, pursuant to 22 NYCRR §691.4(l), seeking her immediate suspension for her alleged failure to comply with the October 18, 1990 Order directing her to be examined, was supported by a petition. Nor were they related to any underlying proceeding. As a result, they were jurisdictionally void. The Verified Complaint further alleged that Appellant contested each Order to Show Cause and additionally moved by Order to Show Cause of her own to vacate the October 18, 1990 Order, but that Defendant Second Department's Orders thereon made no findings whatever.

The Verified Complaint alleged that she was deprived of all appellate review of the June 14, 1991 suspension Order: Defendant Second Department denied her leave to appeal to the New York Court of Appeals, which also denied review, both as of right and by leave. Appellant was also denied independent review by way of an Article 78 proceeding because Defendant Second Department refused to disqualify itself from that proceeding which Appellant brought against it. As alleged, Defendant Second Department dismissed it by granting a legally insufficient and factually perjurious dismissal motion of its own attorney, the New York Attorney General, in a decision which was a knowing and deliberate fraud. Thereafter, the State Attorney General opposed Appellant's attempts to obtain review by the New York Court of Appeals of his client's fraudulent

decision dismissing, on jurisdictional grounds, the case in its own favor. **[p. 9]** The Court of Appeals denied review, as of right[10].

As pleaded by the Verified Complaint, the egregious violations of Appellant's constitutional rights were made possible by the fact that Judiciary Law §90 vests original and exclusive control of attorney discipline in the state Appellate Divisions, thus enabling their misuse of that disciplinary power to retaliate against whistle-blowing attorneys who expose judicial misconduct by state court judges. Additionally, those courts have promulgated statutorily-unauthorized interim suspension rules, without provision for appeal. This includes §691.4(l), the specific rule under which Appellant was suspended. As alleged in Appellant's First Cause of Action for Declaratory Judgment [R-83-87], the New York Court of Appeals, in Nuey [R-528], explicitly recognized that §691.4(l) is statutorily unauthorized. The consequence of §691.4(l) not being grounded in the statute is that there is no statutory right of appeal therefrom.

The Complaint also cited to Russakoff [R-529], wherein the New York Court of Appeals found §691.4(l) to be constitutionally infirm for lack of provision for a post-suspension hearing.

Both Nuey and Russakoff mandate immediate vacatur of finding-less interim suspension orders. Yet, as alleged, Defendant Second Department summarily denied Appellant's repeated vacatur motions based thereon -- disregarding her a fortiori showing of entitlement -- and the New York Court of Appeals, in violation of her equal protection rights, **[p. 10]** denied her leave to appeal, previously

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[10] The record before the District Judge and panel also presented the "post-Complaint" course of the proceedings. These included an attempt by Appellant to seek review, by leave, to the Court of Appeals in her Article 78 proceeding, and, after that was denied, a petition for certiorari to the U.S. Supreme Court, also denied. As the record before the District Court showed, and as highlighted on the appeal, the State Attorney General also opposed Appellant's cert petition by asserting to the U.S. Supreme Court that the New York Court of Appeals' denial of review of the Second Department's dismissal of her Article 78 proceeding was "not on the merits", while simultaneously claiming in this action before the District Judge that it was on the merits for purposes of Defendants' res judicata /collateral estoppel defense (Reply Br. 31).

granted to attorneys Nuey and Russakoff -- thereby denying her the vacatur relief to which she was, of right, constitutionally entitled.

The Verified Complaint was replete with particularized allegations of fraud, misrepresentation, and other misconduct of Defendant Second Department's appointee, Defendant Casella, Chief Counsel of the Grievance Committee, relating not only to Appellant's suspension, but to a barrage of spurious unrelated disciplinary proceedings commenced against her, at Defendant Second Department's direction -- all without probable cause and without compliance with express jurisdictional requirements of the statutory and court rules invoked. None of Appellant's challenges before Defendant Second Department to the jurisdiction-less, law-less, malicious, and invidious conduct of Defendant Casella resulted in any adjudications other than "no-reason" orders denying her all relief.

PROCEEDINGS IN THE DISTRICT COURT AND THE CIRCUIT PANEL COVER-UP

Precisely because the Complaint's allegations of egregious misconduct by state Defendants confer federal jurisdiction to redress Appellant's constitutional challenge to New York's attorney disciplinary law, as written and as applied, the two federal court decisions omit all reference to them. Such purposeful omission is total in the panel's decision (Exhibit "1") and only slightly less so in the District Judge's decision, which, at least, identifies that Appellant claimed "that defendants deprived her of her license to practice law without granting a hearing thereon" [R-4] and includes her allegation that Defendant Second Department was required to recuse itself from her Article 78 proceeding against itself [R-11]. These allegations, however, are sheared from the panel's decision, from which may be inferred that they were too revealing of defense-vitiating due process violations.

Although the appellate standard for review was de novo, because **[p. 11]** the appeal involved the granting of summary judgment to Defendants and the denial of summary judgment to Appellant, the panel's decision never cites the record once. The record shows that Defendants, by their attorney, the State Attorney General, himself a co-Defendant, made a Rule 12(c) dismissal motion, obliterating or affirmatively misrepresenting virtually every pleaded

allegation of Defendants' jurisdiction-less, due-process-less, fraudulent conduct so as to invoke the otherwise inapplicable pleaded defenses of Rooker-Feldman, res judicata, immunity, and 11th Amendment and misrepresented the law relative thereto [R-127]. For this reason, Appellant made a sanctions application against Defendants [R-168(b)-487], simultaneously seeking sanctions against them for their Answer, which she demonstrated to be "false and in bad faith" in response to over 150 of the Complaint's allegations [R-275-302]. Additionally, Appellant made repeated sanctions applications against the assigned Assistant Attorney General for his fraudulent oral advocacy, as well as an application for Rule 56(g) sanctions against Defendant Casella for his frivolous, irrelevant, and non-probative 2-½ page affidavit (R-630-638]) in opposition to her summary judgment application [R-168b-487]. All these sanctions applications were fully documented, uncontroverted and incontrovertible. Yet, the District Judge not only failed to adjudicate them, but he concealed them entirely from his decision. Indeed, his decision rewarded Defendants by, sua sponte and without notice, converting their fraudulent, evidentiarily-unsupported dismissal motion into one for summary judgment in their favor -- where his stated basis for conversion, "voluminous affidavits" filed by both parties [R-12] did not exist as to the Defendants (Br. 57-59), whose only affidavit, by Defendant Casella, was 2-1/2 pages in length and the subject of Appellant's unadjudicated Rule 56(g) sanctions application [R-734-740]. Simultaneously, his decision summarily denied Appellant's evidentiarily and legally-supported summary judgment application.

[p. 12] As hereinabove stated, the panel's decision (at p. 3), expressly, does "not address the district court's...rulings" on any of the motion-submissions. This includes Appellants' sanctions applications against Defendants, which like the District Judge, the panel does not even identify as existing. Appellant's Brief (at 41-43) squarely presented the sanctions issue as embracing not only Defendants' misconduct, but that of the District Judge:

> "the litigation misconduct of Defendants and their co-Defendant counsel, documented in the record before the District Judge, presented a classic Rule 11 case. Indeed, beyond that, it rose to the level of

'fraud upon the court', as that term has been applied in this Circuit, Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960); Kupferman v. Consolidated Research & Mfg. Corp, 459 F.2d 1072, 1078, 1081 (2d Cir. 1972); Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988), Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995); See also, Cresswell v. Sullivan & Cromwell, 771 F. Supp. 580, 586 (S.D.N.Y. 1991)[11]. The law is well-established that courts possess inherent power and a duty to defend their integrity and protect themselves from "fraud upon the court", Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946) and, particularly, where, as here, it involves more than the individual litigants.

At bar, the issues involved corruption by public officials, including high-ranking sitting judges of the State of New York and the state's highest legal officer, the New York State Attorney General, and deliberate misuse of judicial and disciplinary power to retaliate against a judicial whistle-blower, combined with an unconstitutional attorney disciplinary law. Unquestionably, this case transcended the individual litigants. Yet, the District Judge not only ignored Plaintiff's uncontroverted sanctions applications, but disregarded his "own initiative" power under Rule 11(c)(1)(B), as well as his inherent power to evaluate and punish Defendants' fraudulent and deceitful conduct...

The District Judge's refusal to adjudicate the fraud and misconduct before him constitutes his

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[11] See also, DR 7-102(A.5) of the Model Rules of Professional Responsibility: a lawyer may not "knowingly make a false statement of law or fact"; ABA Model Rules of Professional Conduct, Rule 3.3, "Candor Toward the Tribunal"; Rule 8.4 "Misconduct".

> complicity and collusion therewith. It demonstrates his overriding bias and wrongful protection of Defendants -- not just from liability for sanctions, but from ultimate liability in Plaintiff's federal action. Indeed, the very issues that were at the heart of Plaintiff's sanction applications, if resolved, would have made it impossible for judgment to be rendered to [p. 13] Defendants...".

Specifically, Appellant's Brief (at pp. 44-50) highlighted that had the District Judge adjudicated Defendants' misconduct by their dismissal motion, wherein they gutted the Complaint's allegations vitiating their defenses, he would have exposed the very strategy he himself intended to employ to dismiss the Complaint. By the same token, the panel did not adjudicate the sanctions issues because this, likewise, would have prevented it from stripping the Complaint of the allegations that made it invulnerable to Rooker-Feldman and preclusion defenses.

Such collusion and complicity in Defendants' fraud, first by the District Judge, and now by the panel, constitutes serious, high-level, judicial misconduct. That it should be engaged in so brazenly, with a record making it easily verifiable, warrants the inference that the judges involved believe there will be no adverse consequences imposed by the Circuit and that they had a judicial "go-ahead" to "throw" this case. There can be no doubt that this case was "thrown", and with it ALL adjudicatory standards and rules of law went out the window.

It is unknown whether there is a regular practice and course of conduct in this Circuit to "throw" cases involving state court judges sued for corruption, with whom this Circuit, no doubt, has long-standing professional and personal ties, or whether the depraved and lawless dismissal of Appellant's §1983 federal action stems from this Circuit's bias against her, originally arising from its pre-existing animus against her ex-husband, George Sassower, from whom she was divorced more than 12 years ago.

This Circuit's hostility toward Mr. Sassower derives from his well-known judicial whistle-blowing by public advocacy, lawsuits, and misconduct complaints against this Circuit's judges, spanning nearly two decades, wherein he has repeatedly alleged that they

fabricate, distort, **[p. 14]** and suppress material facts in their decisions in order to cover up corruption in the New York State courts, in which the State Attorney General is a collusive, active participant. Like myself, Mr. Sassower came into federal court, seeking enforcement of federally-guaranteed constitutional rights, egregiously violated by state judges -- only to be met with similar perversion of such rights by federal judges.

This petition, setting forth wilful misconduct by two levels of federal judges, the consequence of which is to protect criminal and corrupt conduct by state judges and the State Attorney General, echoes Mr. Sassower's experience. And it reinforces Mr. Sassower's words in the very first §372(c) judicial misconduct complaint he ever filed, #87-8503, which was against a district judge of this Circuit for his dishonest -- and unpublished -- decision and against the three-judge Circuit panel which affirmed it by a not-for-publication, no-citation decision. That Circuit panel included Judge Meskill -- a member of the panel herein. Mr. Sassower aptly stated:

> "If federal judicial officials cooperate with corrupt state judicial officials in the deprivation of constitutional rights, then the federal scheme simply does not exist." (Complaint of George Sassower, filed March 20, 1987, at p. 2, ¶4e)

This is among the most serious of allegations, whose truth is confirmed starkly and unambiguously by the instant case. As such, it more than merits rehearing and rehearing in banc by a fair and impartial tribunal -- which, as the record shows, this Circuit is not.

Appellant raised the issue of this Circuit's bias at the Pre-Argument Conference of this appeal on November 8, 1996 and particularized it in her April 1, 1997 motion, requesting the Circuit to recuse itself sua sponte. That substantive motion, also seeking sanctions against the State Attorney General for his documented fraud and misconduct in the case-management phase of this appeal, was summarily denied by a three-judge **[p. 15]** panel (Judges Amalya

Kearse, Guido Calabresi, and Louis Oberdorfer)[12]. The panel's one-word general denial of that fact-specific, meritorious motion further demonstrates this Circuit's abandonment of cognizable legal and ethical standards, establishing, prima facie, its actual bias.

Incorporated herein by reference and made part hereof, as if more fully set forth herein, is Appellant's separately-filed formal motion for: (a) recusal, pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution and 28 U.S.C. §455(a) of this Circuit and, in particular, of the three-judge appellate panel; (b) transfer of the appeal to another Circuit; (c) vacatur for fraud, misrepresentation and other misconduct of an adverse party, as well as of the District Judge, pursuant to Rule 60(b)(3) and 60(b)(6), respectively, and the Court's "inherent power", of the Judgment of the district court and of the Summary Order and Decision affirmance of the panel; (d) immediate vacatur of Defendant Second Department's June 14, 1991 finding-less "interim" order of suspension, pursuant to Nuey and Russakoff; and (e) such other and further relief as is just and proper.

Likewise incorporated herein by reference and made part hereof are Appellant's separately-filed §372(c) judicial misconduct complaints against the District Judge, as well as against the panel members, for their official misconduct, as summarized herein and further detailed in her recusal motion.

s/
DORIS L. SASSOWER
Petitioner-Appellant Pro Se

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[12] Prior to its decision, Appellant submitted an April 28, 1997 Supplemental Affidavit, detailing that Amalya Kearse, the panel's presiding judge, was disqualified by reason of her direct participation in the events forming the basis of Appellant's claim of actual bias by the Circuit.

EXHIBIT "A" TO PETITIONER'S RECUSAL/RULE 60(b) MOTION TO VACATE FOR Fraud, filed September 10, 1997 in the Second Circuit Court of Appeals and incorporated by reference in her Petition for Rehearing with Suggestion for Rehearing *In Banc*

[Also annexed to Petitioner's §372(c) complaint against the district judge (as Exhibit "B") and her §372(c) complaint against the appellate panel judges (as Exhibit "C")]

THE LONG TERM VIEW (MASSACHUSETTS SCHOOL OF LAW), VOL. 4, NO. 1: SUMMER 1997, pp. 90-97

WITHOUT MERIT: THE EMPTY PROMISE OF JUDICIAL DISCIPLINE

Elena Ruth Sassower

Judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad-faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective of whether it is correctable on appeal. And egregious error is also misconduct, since its nature and/or magnitude presuppose that a judge acted wilfully, or that he is incompetent.

How can you make any assessment of how judicial misconduct mechanisms are working unless you reach out to the victims of judicial misconduct who have used them?

Elena Ruth Sassower

Elena Ruth Sassower is co-founder and coordinator of the Center for Judicial Accountability, Inc. (CJA), a non-profit, non-partisan citizens' organization with members in more than thirty states. Its goal is to reform judicial selection and discipline on national, state, and local levels. Its website is at http://www.judgewatch.org

Editors' note: This article is a critique of the judicial discipline system which should be aired. Publication of the critique does not constitute an endorsement of the Center for Judicial Accountability's claims about particular cases.

The most serious misconduct by judges is that which is the least likely to subject them to discipline. It is not what they do in their private lives, off the bench, but what they do on the bench in the course of litigation. The obvious image is the judge who runs his courtroom as if he owns it, who looks down from his elevated bench and treats litigants and their attorneys in an imperious and abusive fashion. But even where a judge is, as he is supposed to be, patient and dignified in his demeanor, every court appearance, just like every written motion, involves a judge ruling on a procedural or substantive aspect of a case. And there are judges who, while presenting a veneer of fairness, are intellectually dishonest. They make rulings and decisions which are not only a gross abuse of discretion, but which knowingly and deliberately disregard "clear and controlling law" and obliterate, distort, or fabricate the facts in the record to do so.

Why would a judge be intellectually dishonest? He may be motivated by undisclosed bias due to personal or political interest. Judicial selection processes are politically controlled and closed, frequently giving us judges who are better connected than they are qualified. And once on the bench, these judges reward their friends and punish their enemies. Although ethical codes require judges to disclose facts bearing upon their impartiality, they don't always do so. They sit on cases in which they have undisclosed relationships with parties, their attorneys, or have interests in the outcome, and do so deliberately because they wish to advantage either one side over another or sometimes themselves.

They exercise their wide discretion in that side's favor. That's the side for whom deadlines are flexible and for whom procedural standards and evidentiary rules don't apply. A common thread running through judicial misconduct cases is litigation misconduct by the favored side. Meanwhile, the other side struggles to meet inflexible deadlines, and has its worthy motions denied. In extreme cases, a judicial process predicated on standards of conduct, elementary legal principles, rules of evidence, simply ceases to exist.

Intellectual Dishonesty

Every case has many facts, any of which may be inadvertently "misstated" in judicial decisions. But judicial misconduct is not about innocent "misstatement" of facts and, certainly not about peripheral facts. It involves a judge's knowing and deliberate misrepresentation of the material facts on which the case pivots. These facts determine the applicable law. If the applicable law doesn't allow the judge to do what he wants to do, he's going to have to change the material facts so that the law doesn't apply. When judges don't want to put themselves on record as dishonestly reciting facts, they just render decisions without reasons or factual findings.

The prevalence of intellectually dishonest decisions is described by Northwestern Law Professor Anthony D'Amato in "*The Ultimate Injustice: When the Court Misstates the Facts*". He shows how judges at different levels of the state and federal systems manipulate the facts and the law to make a case turn out the way they want it to. It quotes from a speech by Hofstra Law Professor Monroe Freedman to a conference of federal judges:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.[1]

Afterward, when Professor Freedman sat down, a judge sitting next to him turned to him and said, "You don't know the half of it."

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[1] Anthony D'Amato, "The Ultimate Injustice: When the Court Misstates the Facts," *Cardozo Law Review*, Vol. 11: 1313 (1989).

The Myth of Recusal

There's next to nothing you can do when you're before a dishonest judge. He's not going to respond to a recusal motion with "Hallelujah, you've shown me the light. I'll step down". His dishonesty will carry through to the recusal motion, which, while asserting his complete fairness and impartiality, he will deny from the bench, with no written decision or, if by a written decision, then one stating no reasons or misstating the basis for recusal. And just as making a formal recusal motion entails expense, as any motion does, so does taking an interim appeal, which may not be feasible.

Of course, there's a problem even before making a recusal motion. Your lawyer may not want to make one because it means taking on the judge by accusing him of biased conduct. A lawyer's ethical duty is to zealously represent each client, but lawyers have other clients, whose cases may come before that judge. And it is not just their relationship with that judge that they want to protect, but with his judicial brethren, who are part of the judge's circle of friends and may be quite defensive of his honor, which they see as an extension of their own..

Congress has passed two specific recusal statutes proscribing judicial bias and conflict of interest by federal judges. These have been gutted by the federal judiciary. One statute explicitly states that whenever a party files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding...". It seems pretty clear on its face. Yet the federal courts have interpreted this to mean that the judge who is the subject of the recusal affidavit determines its timeliness and sufficiency. The result is predictable. The complained-of judge acts as a censor, ruling that a timely and sufficient affidavit is untimely and/or insufficient so as to prevent its being heard on the merits by another judge.

On top of that, the federal courts have interpreted the recusal statutes to require that the basis for recusal be "extrajudicial". This means that the facts giving rise to recusal can't come from the case itself, but from something outside the case. Thus, if the basis of the recusal motion is that the judge has been oppressive, bullying, and

insulting, has wilfully disregarded black-letter law and falsified the factual record -- in other words, that he has engaged in all the misconduct popularly believed to be biased -- that judge need not step down when a recusal motion is made. The litigant or his lawyer has the impossible burden of trying to ferret out information about the judge's personal, professional, and political life so as to figure out the "why" behind the egregious misconduct. Parenthetically, the U.S. Supreme Court, having long ago generated the "extrajudicial" source doctrine out of thin air, has implicitly approved a "pervasive bias" exception to it. This, of course, means nothing to a biased judge, who will pretend he is unable to discern *any* bias, let alone "pervasive bias".

The Chimera of Judicial Discipline

You would think that where a judge consistently abuses his discretion and renders dishonest rulings, including on recusal motions, a formal judicial misconduct complaint would be taken seriously by a disciplinary body. Each of the 50 states and the District of Columbia has a commission, committee, council, or review board, whose purpose is to address complaints of judicial misconduct by state judges within its jurisdiction. There is also a mechanism for complaints against federal judges, which is set forth at 28 U.S.C. §372(c). Because it was enacted by Congress in 1980, it is commonly called "the 1980 Act".

These disciplinary mechanisms frequently dismiss, out-of-hand, complaints of on-the-bench misconduct, including abusive courtroom behavior and fabricated judicial decisions. They do this on the pretense that they have no authority to review "merits of matters within a judge's discretion, such as the rulings and decision in a particular case," which they assert can only be reviewed by an appeal to an appellate court. The theory here is that doing otherwise infringes upon judicial independence, the important principle that judges be free to decide cases based on the facts before them and applicable law, without outside pressure and influences. However, judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad-faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective

of whether it is correctable on appeal. And egregious error is also misconduct, since its nature and/or magnitude presuppose that a judge acted wilfully, or that he is incompetent.

Under the 1980 Act, one of the statutory grounds upon which a Chief Judge may dismiss a judicial misconduct complaint is if he finds it to be "directly related to the merits of a decision or procedural ruling." Although a complaint alleging bad-faith, biased judicial conduct -- including legally insupportable and factually dishonest rulings -- should not be dismissed as "merits-related," it invariably is. Adding insult to injury, Chief Judges sometimes tack onto their dismissal orders another statutory ground for dismissal, "frivolousness." In their view, a bias claim supported *only* by erroneous rulings and decisions, no matter how egregious, is "frivolous."

The Illusory Remedy of Appeal

Faced with a dishonest judge, litigants often cave in at the trial level and never make it to appeal. It's too emotionally and financially draining to continue before a biased and dishonest judge. This is not to say that justice is obtainable on appeal. Even with a reversal, the onus of the appeal is on the aggrieved litigant, who, at best, gets what he was entitled to at the outset, only years later after spending untold amounts of money on legal fees and costs. Beyond that, the appellate decision, if it even identifies the "error" as judicial misconduct, will likely minimize it. Notwithstanding their ethical duty, appellate judges rarely, if ever, take steps to refer an errant trial judge for disciplinary action. And this is where the appellate process "works"!

In the federal system and in most state systems, you get only one appeal as of right. After that it's at a higher court's option. And what happens when you file misconduct complaints against appellate judges for their dishonest decisions? Just like the dishonest decisions of trial judges, they'll be tossed out as "merits related."

The Report of the National Commission on Judicial Discipline and Removal

Created by Congress, the National Commission on Judicial Discipline and Removal was supposed "to investigate and study the problems and issues" relating to judicial discipline and removal in the federal system and to evaluate more effective alternatives. In August 1993, it issued a report concluding that existing mechanisms were sufficient to deal with misconduct by federal judges. All that was necessary was a little tinkering. With that, at a cost to taxpayers of nearly $1,000,000, the Commission passed out of existence, indefinitely setting back the cause of meaningful judicial reform.

How did the Commission reach its conclusions? Not by making any significant outreach to those having direct, first-hand experience with the key "problems and issues," most of which it dodged. Indeed, the Commission's researchers never interviewed anyone who had filed a judicial misconduct complaint with the federal judiciary under the 1980 Act or with Congress to initiate its impeachment procedures. How can you make any assessment about how these mechanisms are working unless you reach out to the victims of judicial misconduct who have used them? Yet the researchers who reviewed §372(c) complaints were not ashamed to admit, "We know little about complainants and what they seek. We did not design this research to address those issues."[2] This admission is buried deep within their underlying research study.

Instead, the Commission's researchers interviewed Circuit Chief Judges and Circuit Executives about their experience in administering the 1980 Act. And how did the Chief Judges explain the value of the 1980 Act when 95% of the complaints filed were dismissed, mostly on the statutory ground that they were "merits-related"? They made claims about how the Act served as a deterrent to misconduct, and that "informal" discipline was taking place behind the scenes, using phrases like "still water runs deep." The judges insisted on absolute anonymity and that their comments be camouflaged to prevent them from being traced back to their Circuit.

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[2] Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, p. 625.

The Commission gave scant recognition that judges' responses might be tainted by self-interest.

The judges' anonymous comments cannot be verified, nor can the Commission's conclusions about the judicial misconduct complaints it reviewed. This is because the complaints are inaccessible to the public.

The Commission's report fails to say that it was the federal judiciary which made §372(c) complaints confidential -- not Congress -- and does not explore how this has frustrated Congress' ability to exercise the "vigorous oversight" it promised when it passed the 1980 Act. There were fears that the federal judiciary would be unwilling to police itself. Yet not only does the report not alert Congress to its prerogative to amend the §372(c) statute to ensure public access to the complaints, but the Commission allowed the federal judiciary to undermine what was supposed to be the first real evaluation of the 1980 Act. It did this by permitting the federal judiciary to dictate the strict terms under which it would allow the Commission to review a sampling of §372(c) complaints: only designated court-connected researchers could review them. The Commission should have objected, strenuously, so that the complaints could be independently reviewed by outside individuals. Instead, it capitulated to judicial interests, which were heavily represented on the Commission. As a result, its report is not based on a truly independent review of complaints filed under the 1980 Act.

As for complaints filed with Congress and referred to the House Judiciary Committee, the Commission's report states they "may be made available upon request." Quoting the report as authority, the Center for Judicial Accountability asked to examine the very complaints the Commission's researchers had reviewed. We were told that we would be notified when the Committee's policy for reviewing past complaints "was decided." That was *more than two years ago* and we're still waiting for word of the Committee's policy.

The House Judiciary Committee fully participated in the Commission's report. The list of members and counsel from the House Judiciary Committee involved in the Commission's work reads like a *Who's Who*. Its courts subcommittee held a hearing on the Commission's draft report. The natural assumption is that the report would be extremely accurate about the House Judiciary Committee's procedures. But accuracy would have exposed the

Committee's dereliction.

The shameful facts about the House Judiciary Committee's operations are cut from the Commission's report. You see this when you compare it with the draft report that preceded it, and then compare them to the underlying research studies. The report depicts the House Judiciary Committee as professional and responsive. But a wholly different picture emerges when you turn back to the underlying research studies. Even the draft report discloses that over 80% of the complaints reviewed by the researcher had not even been responded to by the House Judiciary Committee. That statistic is gone from the final report. Likewise cut from the final report is the draft's statement that "Well over 90% of the complaints [filed with the House Judiciary Committee] do not raise genuine issues pertinent to judicial discipline and impeachment." That means up to 10% do raise such issues. The obvious next question is what the House Judiciary Committee did with these serious complaints. The draft report doesn't have the answer. You have to turn back to an underlying study to find out that the Committee either did not respond to these complaints or, if it had, did nothing beyond that.

The Failure of the 1980 Act

Because the House Judiciary Committee does not investigate individual complaints, the 1980 Act is the only avenue for disciplining the federal judges. Yet the vast majority of complaints are dismissed on the Act's statutory ground that they are "directly related to the merits of a decision or procedural ruling." The Commission's report does not disclose this important fact.

Plainly, for Congress to exercise "vigorous oversight" over the federal judiciary's administration of the Act, which is what the Commission was supposed to facilitate, it needed to know how the federal judiciary was interpreting "merits-relatedness." This was all the more essential because the federal judiciary had made judicial misconduct complaints confidential. Most importantly, was the federal judiciary treating complaints alleging bias, including dishonest decisions, as "merits-related"? Additionally, because the statute does not actually require dismissal of "merits-related" complaints, but only that such complaints "may" be dismissed, Congress needed to know what factors the federal judiciary was considering in exercising

its discretion.

Yet, the two paragraphs of the Commission's 150-page report devoted to "merits-relatedness" make it utterly impossible for Congress or anyone else to discern how the federal judiciary has interpreted that statutory ground or exercised its discretion. The first paragraph concedes confusion as to the relationship between "merits-relatedness" and an appellate remedy, which may or may not exist. The second paragraph then tries to minimize the fact that even where there is no appellate remedy, "merits-related" complaints are dismissed. It trumpets that the "core reason" for excluding such complaints from disciplinary review is "to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process...." But this is rhetoric. "The independence of the judicial officer" does not extend to bad-faith conduct, including decisions motivated by bias and other illegitimate purposes. And disciplinary review is appropriate under such circumstances, whether or not there is an appellate remedy.

Not only did the Commission fail to articulate this appropriate standard, but the researchers did as well. Three of the Commission's separate underlying research studies quote from a 1987 memo by Patricia Wald, then Chief Judge of the D.C. Circuit, to Judge Elmo Hunter, who had been instrumental in developing the 1980 Act and was then chairman of the Court Administration Committee of the Judicial Conference, the federal judiciary's "top management":

> ...Since the vast majority of complaints we receive come out of judicial proceedings, some clarification...would be helpful. Is anything that arose in the course of a proceeding out of bounds for a complaint, or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?

Where is the answer to Judge Wald's straight-forward question? The researchers, including those who had interviewed Chief Judges, do not refer to any answer from Judge Hunter or any other judge. Nor do they provide their own answer. How could the federal judiciary properly and consistently address §372(c) complaints

if it was unable to answer that question *13 years* after passage of the 1980 Act?

The obvious conclusion, which the Commission chose to ignore and conceal, is that the federal judiciary had deliberately left the "merits-related" category vague in order to dump virtually every judicial misconduct complaint it receives. This is clear from the circuits' failure to develop and publish a body of decisional law relative to the 1980 Act, despite a 1986 recommendation by the Judicial Conference that it do so

Direct, First-Hand Experience

The dishonesty of the National Commission is further exposed by the direct, first-hand experience of CJA and its personnel. Back in June 1993, when the Commission issued its draft report, purportedly for public comment, we responded to its conclusory claims that the appellate process constituted a "fundamental check" of judicial misconduct, as did "peer disapproval" among judges. To rebut such claims, we provided it with the appellate record of a case in which a district judge's factually-fabricated and legally insupportable decision was affirmed by a circuit court panel. Although the panel's decision rested on non-existent facts and was, on its face, aberrant, contradictory, and violated black-letter law of the circuit and the U.S. Supreme Court, attempts to obtain discretionary review by the full circuit and in the Supreme Court were futile.

We pointed out to the Commission that its draft report, expressing confidence in the formal mechanisms for discipline in the judicial branch, had stated that it would not recommend substantial change "absent a convincing demonstration of the inadequacy of the 1980 Act." We asked the Commission directly whether a complaint against the judicial authors of those fraudulent and lawless decisions was reviewable under the 1980 Act. If not, then there was no remedy in the judicial branch and the case should be designated by the Commission as providing the required "convincing demonstration" for a recommendation of more substantive changes.

But the Commission refused to answer whether such a complaint would be reviewable under the Act and directed us to seek review by the House Judiciary Committee. Three weeks later, the

House Judiciary Committee's counsel -- who was also its liaison to the National Commission -- told us that "there has never been an investigation of an individual complaint in the history of the House Judiciary Committee" and that we shouldn't expect it to start now. It was then August 1993 and the Commission's final report was just published, touting the appellate process and "peer disapproval" as "fundamental checks," and the House Judiciary Committee as a proper recipient for complaints, with investigative capacity.

At that point the National Commission was defunct. So we wrote to the House Judiciary Committee, asking that it clarify what it does with the judicial misconduct complaints it receives. If it was not investigating them, why did the Commission's report not say that? For nearly two full years, the House Judiciary Committee ignored all our many follow-up letters and phone calls. Finally in June 1995, successor counsel reiterated that the House Judiciary Committee does not investigate complaints of judicial conduct filed with it, but confines itself to legislation. He explained that the Committee simply doesn't have the budget for investigations. The Committee might have had the money if the Commission's report had been more forthright, rather than dodging the issue with a vague recommendation that the House "ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters."

According to the Commission's report, the standard practice of the House Judiciary Committee is to direct complainants' attention to the 1980 Act. It cautioned the Committee to "tell complainants that the 1980 Act does not contemplate sanctions for judges' decisions or issues relating to the merits of litigation." Since the House Judiciary Committee had not directed us to file a complaint under the 1980 Act, we asked it whether this meant that it did not believe our complaint was reviewable under the Act. But the Committee, like the National Commission before it, would not tell us. Ultimately, it became obvious that it had not the foggiest idea. And, again, the reason is attributable to the Commission's report which is wholly uninformative on the subject of "merits relatedness."

Meanwhile, our growing expertise and persistence paid off with the House Judiciary Committee. In February 1996, its counsel met with us and agreed that if the federal judiciary rejected our complaint as "merits-related", the House Judiciary Committee would have to undertake an investigation. So, we filed our complaint.

What happened? Our complaint was improperly dumped as "merits-related" in a conclusory order which itself was a prime example of a dishonest decision. For this reason, we sought review by the Circuit Council. Our petition demonstrated that the dismissal order was legally and factually insupportable and that it contemptuously disregarded the National Commission's recommendation that dismissal orders be reasoned and non-conclusory and that the circuits resolve ambiguity in the interpretation of the 1980 Act. We pointed out that the Judicial Conference had endorsed each of these recommendations and that our complaint was ideally suited for building interpretive precedent to make clear, once and for all, that complaints alleging bias, bad-faith conduct are not "merits-related" and additionally that even "merits-related" complaints are not required to be dismissed under the statute. The Circuit Council's response? It denied our petition in one sentence. The cover letter informed us that, under the Act, there was no further review.

But the Judicial Conference has oversight responsibility -- and we turned to it. The Assistant General Counsel to the Administrative Office of the U.S. Courts is the liaison to the Judicial Conference's disciplinary committee. His refusal to take any steps on our documented showing that the circuit is subverting the Act and the recommendations of the National Commission and Judicial Conference bears directly on the integrity of the National Commission's review of §372(c) complaints, since he was one of the two court-connected researchers who examined those complaints for the National Commission. He was not Assistant General Counsel at the time he examined complaints for the Commission. He was promoted to that position afterwards, presumably because the federal judiciary liked his conclusions so well.

In the end, we have empirically proven more than the "inadequacy of the 1980 Act" resulting from an over-expansive judicial interpretation of "merits-relatedness." We have demonstrated that the 1980 Act is a facade behind which the federal judiciary dismisses fully-documented complaints of dishonest judicial decisions by decisions which are themselves dishonest and which, properly, should be the subject of disciplinary review -- if there were any place to go for redress.

That's yet another reason why we are trying again with the

House Judiciary Committee. We are now preparing a formal presentation to it based on our §372(c) complaint, as well as the §372(c) complaints of our members. These, likewise, have been dishonestly dismissed as "merits related" in conclusory orders which similarly misrepresent the serious misconduct issues presented. Based on this evidence, and the first-hand testimony of people who have brought complaints, the House Judiciary Committee will get a good look at what the federal judiciary, working through the National Commission, did not want it to see: flagrant judicial misconduct and corruption which the federal judiciary was able to cover-up when it made §372(c) complaints confidential. We believe it will be the basis for ending that confidentiality and for creating an alternative disciplinary mechanism, one outside the federal judiciary, to review judicial misconduct.

EXHIBIT "N-1" TO PETITIONER'S RECUSAL/RULE 60(b) MOTION TO VACATE FOR FRAUD, filed September 10, 1997 in the Second Circuit Court of Appeals and incorporated by reference into her Petition for Rehearing with Suggestion for Rehearing *In Banc*

[Also annexed as Exhibit "A" to Petitioner's §372(c) complaints against the appellate panel judges]

* * *

APPENDIX SHOWING THAT THE CIRCUIT PANEL'S 3-1/4 PAGE SUMMARY ORDER FALSIFIES, MISREPRESENTS, AND SUPPRESSES THE MATERIAL ALLEGATIONS OF APPELLANT'S VERIFIED COMPLAINT, AS WELL AS THE FACTS IN THE RECORD -- ALL OF WHICH WERE HIGHLIGHTED BY APPELLANT'S UNCONTROVERTED[1] BRIEF AND REPLY BRIEF

PAGE 2 of Panel's Summary Order:

"ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that **the Judgment of the District Court be and it hereby is affirmed**."

The panel's summary Order (p. 3) expressly does not address the motion-submissions before the District Judge -- yet it "affirms" the District Judge's Judgment [R-2] disposing of those motion-submissions, including his granting of summary judgment dismissal to Defendants. At the same time, the panel's Order dismisses Appellant's Complaint, purportedly on the pleading. In fact, it goes outside the pleading, as reflected by its reference to Appellant's cert petition (See, inter alia, its footnote 1) -- which is not part of the Complaint [R-23-100] (See, Br. 11-12, fn. 4).

---

[1] Defendants' Appellees' Brief did not deny any of the factual showing or legal argument presented in Appellant's Brief. Indeed, it did not even refer to Appellant's Brief. This was highlighted in Appellant's Reply (at 2), which sought sanctions against Defendants for their bad-faith and frivolous opposition to the appeal.

1st paragraph after "the Judgment of the District Court...is affirmed" [at p. 2]

The characterization of the District Judge's Memorandum Opinion and Order as "cogent" is a flagrant deceit. Appellant's uncontroverted 76-page Brief, with its annexed 7-page Appendix, both meticulously cross-referenced to the record, documentarily established that the District Judge's decision, wilfully misrepresented the material allegations of the Verified Complaint and the "course of the proceedings" before him -- including the submissions before him for adjudication.

2nd paragraph after "the Judgment of the District Court...is affirmed" [at p. 2]

Sentence One:

"The complex facts and procedural history of this case are set forth in detail in the district court's opinion, see id. at 115-118, and are recounted here only in brief."

> The claim that "The complex facts and procedural history of this case are set forth in detail in the District Court's opinion" is a flagrant deceit. Comparison with the record, highlighted by Appellant's uncontroverted 76-page Brief and 7-page Appendix, shows that the District Judge deliberately falsified, distorted, and suppressed the salient facts and procedural history of the case -- none of which were particularly complex.
>
> Such unfounded praise of the District Judge's decision is obviously to provide the panel with an excuse for recounting the case "only in brief", as well as for relying exclusively on the decision, rather than back to the record. Thus, the immediately-following four sentences of the Order track

the pages of the decision, rather than the paragraphs of the Verified Complaint. This is because the panel knows, from Appellant's uncontroverted Brief and Reply, that were it to cite to paragraphs of the Verified Complaint, it could not make the selective representations it does, which, like those of the District Judge, are knowingly false and misleading.

Sentence Two: [p. 2, ¶2]

"Sassower was a member in good standing of the New York bar in October 1990, when she was **ordered** by a state bar regional grievance committee -- **pursuant to a pending disciplinary proceeding against her** related to fee disputes --- to undergo a medical examination to determine her mental fitness to practice law. Id. at 115-116."

(A) "...in October 1990...she was **ordered**"

Like the District Judge, the panel attempts to create the misleading inference that the October 18, 1990 Order was lawful. Appellant's Verified Complaint alleged, with particularity, that the October 18, 1990 order was **not** "lawful", was erroneous in at least seven material respects -- and that she challenged it, including by an Order to Show Cause for vacatur, See ¶¶79, 83, 89. This was expressly highlighted in Appellant's Brief (at 6-7), as well as in her Appendix (at 2), which pointed out that the District Judge's decision INCORRECTLY cited ¶93 of her Complaint for its false and distorted recitation. The correct paragraph citation (¶78) relating to Defendant Second Department's issuance of the October 18,

1990 Order connects it with the Third Department's cancellation of the oral argument scheduled in the Election Law case of Castracan v. Colavita, that Appellant, was to have argued on October 19, 1990 as pro bono counsel for the petitioners in that case. That case -- and the entire political background to Appellant's suspension and the barrage of bogus disciplinary proceedings against her -- is completely omitted by the panel's Order, much as it was by the decision of the District Judge (Br. 67; cf. Br. 6: fn. 3).

(B) "**pursuant to a pending disciplinary proceeding against her**" **[p. 2, ¶2]**

Like the District Judge, the panel attempts to create the deliberately false and prejudicial impression that the October 18, 1990 Order was related to the pending disciplinary proceeding involving fee disputes. It was not. It was completely separate and unrelated. This was emphasized, with particularity, in the Verified Complaint (¶¶83, 87, 88, 108, 158), precisely because such deliberate misrepresentation blossomed into the fraudulent means by which Defendants pretended the Defendant Second Department had jurisdiction to issue that Order, pursuant to §691.13(b)(1), and the subsequent, equally jurisdiction-less June 14, 1991 "interim" suspension Order, pursuant to §691.4(l) -- both of which were unsupported by any petition, as called for by the court rules. This was expressly highlighted in Appellant's Brief (at 7) and in her Appendix (at p. 2), which pointed out that the District Judge's decision INCORRECTLY cited ¶93 of her Complaint for its false and distorted recital.

Sentence Three: [p.2, ¶2]

"Sassower **refused** to comply with that **order**, and in June 1991 her license to practice law in the State was suspended; two supplemental disciplinary petitions were subsequently filed against her as well. Id. At 116."

(A) "Sassower **refused** to comply with that **order**..."

> There is no evidence in the record to substantiate the characterization "refused", which the panel takes from the District Judge's decision. It appears nowhere in the Verified Complaint and is belied by its allegations. Moreover, Appellant's Appendix (at p. 2) pointed out that the District Judge, in purporting to support his false statement "refused", cross-referenced an incorrect paragraph of her Complaint. See, also Appellant's Reply Brief (at 17), which noted that Defendants' Appellees' Brief modified the wording in its factual recitation to "she failed to comply", thereby highlighting "Plaintiff's allegation in her Complaint [R-86], reinforced in her cert petition [R-341], that §691.4(l) is unconstitutional in that it 'contains no requirement of wilfulness or mala fides in connection with the act(s) constituting a basis for suspension."
>
> The panel's Order suppresses the allegations of the Verified Complaint as to Appellant's true response to the jurisdiction-less, erroneous, and factually and legally baseless October 18, 1990 Order: her lawyer attempted to clarify the matter with Defendant Casella (¶83) and, following Defendant Casella's arrogant response (¶84), the lawyer brought a legal challenge to the October 18, 1990 Order by an Order to Show

Cause for vacatur (¶85). This, Defendant Second Department denied, without findings or reasons, on June 12, 1991 (¶91), two days before it suspended Appellant, without findings or reasons (¶93) and only days following publication of Appellant's Letter to the Editor in the New York Times, announcing her intention to appeal the Election Law case of Castracan v. Colavita to the New York Court of Appeals and her transmitted opposition to the Governor of information as to the unfitness of a prospective judicial appointee (¶90).

(B) "Sassower refused to comply with that **order**..."

The panel's Order suppresses that the Verified Complaint expressly alleged (¶¶89, 107) that the October 18, 1990 Order was not a "lawful mandate", as is required under §691.4(l)(1)(I). This is highlighted, as well in Appellant's Appendix (p. 2).

(C) "...and in June 1991 her license to practice law was suspended"

The panel's Order omits any identification of the rule provision under which Appellant was suspended, which is §691.4(l) -- an "interim" suspension rule. Appellant's Brief (at 56, 71), Appendix (at 3), and Reply Brief(at 14) pointed out that the District Judge's decision had misidentified the rule under which Appellant was suspended as §691.13(b)(1) and suggested that this was because the facial unconstitutionality of §691.4(l), by reason of its failure to provide for a prompt post-suspension hearing, had been recognized by the New York Court of

Appeals in Matter of Russakoff, 72 N.Y.2d 520 (1992) [R-529]. Moreover, as alleged by Verified Complaint (¶94), the New York Court of Appeals in Matter of Nuey, 61 N.Y.2d 513 (1984) [R-528], recognized that §691.4(l) is statutorily unauthorized. Both cases expressly held that interim suspension orders without findings must be immediately vacated -- and were so identified in Appellant's Verified Complaint since her suspension was "without findings" -- notwithstanding the express findings requirement of §691.4(l).

The panel suppresses from its Order any identification of the fact that Appellant was not suspended under a final order, but an "interim" order, which, contrary to the District Judge's decision, was unconditional [R-24, 97](Br. App p. 3), omits any identification of the rule under which Appellant was suspended, and omits any mention of Nuey and Russakoff, as well as ALL the material pleaded facts relating to Appellant's suspension, namely, it was without notice of charges, without findings, without reasons, and without a hearing -- as alleged repeatedly throughout the Verified Complaint (¶3), and without a right of appellate review. These in addition to the political backdrop to the suspension, as set forth throughout the Verified Complaint in nearly 70 allegations (Br. at 6: fn. 3).

(D) "...two supplemental **disciplinary petitions** were subsequently filed against her, as well. Id at 116."

The panel suppresses from its Order the innumerable specific allegations of the Verified Complaint that the supplemental

disciplinary petitions (¶¶101-105, 123-4, 125-133, 135-142; 146-7, 149-156, 160-162) like the first disciplinary petition (¶¶40-42, 55-60), which *was completely separate from and* unrelated to Appellant's suspension -- violated the express jurisdictional and due process requirements of §691.4 et seq., and were factually and legally baseless, retaliatory, and politically-motivated. These egregious violations were pointed out in Appellant's uncontroverted Brief (at 6) and in her Appendix (pp. 4, 5).

Sentences Four and Five: [p. 2, ¶2]

[4]

"Over the course of the next several years, Sassower filed numerous appeals, motions, and **independent actions** challenging the suspension of her license, including, inter alia, **a direct appeal of the suspension order to the New York State Court of Appeals**, a proceeding under Article 78, N.Y.C.P.L.R. §§7801 et seq., and a petition for a writ of certiorari to the United States Supreme Court, pursuant to 28 U.S.C. §1257(a).

[5]

All of Sassower's actions, petitions, and motions (including motions for reargument) have been denied or dismissed. Sassower, 927 F. Supp. at 116-118."

The panel has concealed from its Order the allegations of the Verified Complaint as to the bias of the state adjudicators -- bias not only in the Second Department, but reaching to the Court of Appeals by reason of the political ramifications of Appellant's judicial whistle-blowing challenge to state judicial selection. Appellant's Reply Brief (at 26-32), in particular, highlighted that the District

Judge's decision had entirely obliterated all her allegations of the bias of the state adjudicators, alleged with particularity in the Verified Complaint as making a travesty of all subsequent (as well as prior) motion practice. Appellant's presentation at oral argument included description of the bias and the retaliatory background to her suspension (Exhibit "K", pp. 8-9) -- all omitted by the panel's Order.

(A) "**independent actions**"

There were no multiple **actions**, but one Article 78 proceeding, which was not **independent** by reason of Defendant Second Department's failure and refusal to recuse itself from a proceeding to which it was a party. The panel fails to identify that critical fact, as alleged in the Verified Complaint, highlighted by Appellant's Brief (at 74-75) and Reply (at 28-29) -- and recognized by Judge Korman in an explicit question posed to Assistant Attorney General Weinstein at oral argument (Exhibit "K", pp. 14-15). Defendant Second Department was without jurisdiction to adjudicate an Article 78 proceeding against itself, as its own case law, cited in the record [R-20] and by Appellant's Brief (at 74) and Reply (at 29) show.

(B) "**a direct appeal of the suspension order to the New York State Court of Appeals**"

The panel creates the false impression that Appellant actually had a direct appeal. This is not adequately clarified by "catch-all" sentence four that "All of Sassower's actions, petitions, and motions (including motions for

reargument) have been denied or dismissed". The fact that Appellant had no appellate or independent review was highlighted by her Brief (at 9-11) and Reply (pp. 27-28, 30-31), which drew attention to the pertinent allegations of the Verified Complaint:

(1) The allegations that Defendant Second Department denied her leave to obtain appellate review (¶¶134, 143);

(2) The allegations that Defendant Second Department subverted her Article 78 independent action by refusing to recuse itself (¶¶178, 183), and blocked her from obtaining review by the New York Court of Appeals (¶¶107, 110, 117, 144-5), including by fraud and deceit (¶¶108-9);

(3) The First Cause of Action for Declaratory Judgment [R-83-87], which recites, as a basis upon which to declare the statutorily-unauthorized interim suspension rules unconstitutional, that they do not provide a right of appeal comparable to the right, albeit limited, given under Judiciary Law §90(8) to attorneys suspended under a final order [R-85-6].

Appellant's presentation at oral argument further emphasized that she had had no appellate review of the "interim" suspension order (Exhibit "K", pp. 4-6). The fact that she had no appeal as of right was recognized by Judge Korman in his exchange with Mr. Weinstein, who, likewise, conceded that Appellant had been unsuccessful in obtaining discretionary review (Exhibit "K", pp. 14-15).

Page 3 of Panel's Summary Order:

First Paragraph:

The panel reduces to a two-sentence paragraph, what, in general terms, Appellant's Verified Complaint seeks. Even here the cross-references are not to the Complaint, but to the District Judge's decision. The panel does not identify any specifics about the basis upon which the Complaint challenges New York's attorney disciplinary law, as written and as applied, or anything about Appellant's claims that Defendants violated her constitutional rights.

Second Paragraph:

The panel relies on the District Judge's decision for its four-sentence recitation of the "Course of the Proceedings" -- notwithstanding Appellant's uncontroverted Brief, cross-referenced to the Record -- demonstrated the falsity of such recitation -- a fact thereafter reinforced by her Reply.

Sentence One:

"The defendants moved under Fed.R.Civ.P.12(c) for a judgment on the pleadings, arguing that the district court lacked subject matter jurisdiction, and that Sassower's claims were barred by res judicata, absolute immunity, and the Eleventh Amendment. Id. At 115."

> The panel omits any mention of Appellant's opposition to Defendants' dismissal motion or the basis therefor. Appellant's opposition demonstrated that the dismissal motion was predicated on misrepresentation of the Complaint and the controlling law -- without which it could not have asserted its defenses. These facts are all meticulously presented by Appellant's uncontroverted Brief (at 14-18, 41-50), with cross-references to the record.

Sentence Two: [p. 3, ¶2]

"Sassower **cross-moved for a preliminary injunction and for summary judgment**, and moved for reconsideration of the court's prior ruling refusing to recuse itself from the case. Id. at 115, 118."

Appellant did **not** cross-move for either a preliminary injunction or for summary judgment. Appellant's uncontroverted Brief (at 18, 19-20, 22: fn. 16, 27, 50, 61) and Reply (at 5-6) demonstrated that this evidentiary fact was repeatedly pointed out to the District Judge, whose decision nonetheless misrepresented those motions, as did his Judgment [R-2]. Yet, the panel relies on the District Judge's decision for its recitation, denying Appellant the benefit of de novo review.

The record shows that Appellant moved for a preliminary injunction by Order to Show Cause [R-488; Br. 20, 50-51] -- which the District Judge wrongfully delayed and then refused to sign (Br. 50-56). And Appellant sought summary judgment by way of a Rule 12(c) conversion in her favor [R-168(b), Br. 18, 60-62)].

Moreover, the panel, like the District Judge, misrepresents the sequence in which Appellant sought the relief she did, which was summary judgment, preliminary injunction, and recusal. As set forth in Appellant's Brief (at 20, 52), one of the reasons why she was absolutely entitled to the preliminary injunction was because Defendants had defaulted in opposing her application for summary judgment.

Unlike the panel's particularization in

sentence one of the bases upon which Defendants sought dismissal, its sentence two provides no information whatever as to what Appellant sought to enjoin by her preliminary injunction (Br. 51), or the basis for her summary judgment request (Br. 18), or the grounds upon which she sought the District Judge's recusal and the form it took, which was by an Order to Show Cause for recusal, pursuant to 28 U.S.C. §144 and §455 (Br. 22-23; 34) -- all of which are particularized in Appellant's uncontroverted Brief. Such particularization of Appellant's submissions would have revealed her entitlement to relief -- which the panel chooses to conceal.

Sentence Three: **[p.3, ¶2]**

"The district court treated the defendants' motion for judgment on the pleadings as one for summary judgment **(because of the extensive affidavits filed by the parties)**, and granted the motion..."

As pointed out by Appellant's Brief (at 58), the District Judge's stated basis for conversion is completely **non-existent** as to Defendants. The record shows that the **only** extensive affidavits filed were by Appellant. Defendants' affidavits consisted of a 2-paragraph affidavit of Assistant Attorney General Weinstein, whose purpose was to annex legal cases [R-129], and a 2-1/2 page frivolous, irrelevant, and non-probative affidavit of Defendant Casella [R-630], for which Appellant sought Rule 56(g) sanctions [R-734].

Moreover, conspicuously omitted by the panel is the fact that the District Judge's conversion of Defendants' dismissal motion

into one for summary judgment in their favor was not only sua sponte, but without notice. The legal significance of this fact is identified in Appellant's uncontroverted Brief (at 57-59) and Reply (at 21). It is dispositive of her right to reversal, as a matter of law. This is quite apart from the fact, detailed by Appellant's uncontroverted Brief (at 23-4, 68, 75) and Reply (at 21), that the record demonstrates the complete absence of any evidence to support an award of summary judgment to Defendants -- a fact omitted from the panel's Order.

Sentence Four: **[p.3, ¶2]**

"Sassower's motions were likewise denied. Id. At 121."

The panel omits that Appellant's numerous sanctions applications against Defendants were **not** denied by the District Judge's decision. They were not identified by it, are not identified by the panel and, to date, remain unadjudicated. As particularized at Point II of Appellant's uncontroverted Brief (Br. 38-50), the reason the District Judge did not adjudicate those sanctions applications was because doing so would have exposed the same stratagem of falsification he needed to employ in his decision to award summary judgment to Defendants, which is what he was pre-determined to do. The panel has similarly not addressed the sanctions issue because doing so would foreclose it from dismissing the Complaint and, indeed, would require it to grant Appellant summary judgment.

Page 4 of Panel's Summary Order:

Second Paragraph:

"**On appeal,** Sassower argues that her complaint does raise claims -- such as her facial challenge to the constitutionality of New York's attorney disciplinary regulations -- that either were **not raised** in her various state-court actions, motions, and appeals, or 'do[] **not require review of any state court decisions**.' Appellant's Brief at 71." (underlining in the original)

(A) "**On appeal...not raised**"

This assertion that, on appeal, Appellant argued that her challenge to the facial unconstitutionality of New York's attorney disciplinary law was not also raised in state court is a fabrication. It appears nowhere in Appellant's Brief, Reply -- or in the oral argument. Indeed, Appellant's Brief (at 72) expressly stated that Feldman required that general challenges first be raised in state court to give it an opportunity to address the constitutional issues.

(B) "'**do[] not require review of any state court decisions.' Appellant's Brief at 71.**"

The panel improperly puts a period at the end of the word "decisions", making it appear that that is where the sentence from Appellant's Brief ends. It does not. The panel cuts out both the end and beginning. The full sentence reads at p. 71 reads "Clearly, where, as at bar, state court disciplinary rules are facially unconstitutional and not based upon state statutory authority, as Russakoff and Nuey reveal, the declaratory judgment relief

> sought in Appellant's First Cause of Action, does not require review of any state court decisions in Plaintiff's case." This is absolutely true -- and, undoubtedly, the reason why the panel does not provide the full sentence or address the explanatory discussion appearing on that page -- or on subsequent pages establishing that her challenge meets the standards of Feldman and that the District Judge's claim that it was "inextricably intertwined" was boiler-plate, failing to address the critical issues (Br. 72-75).

Third Paragraph: [p.4]

"At the outset, **we disagree with Sassower's contentions of fact: we think that all of her present claims were raised in one form or another in the prior proceedings *[fn. 1]***, and that **she now is 'effectively seek[ing] review of judgments of [the] state courts,'** Moccio, 95 F.3d at 197, **judgments that have deprived her of her license to practice law**, and with which she is (understandably) displeased."

[fn. 1] "For example, Sassower's petition for certiorari to the Supreme Court specifically challenges the constitutionality of New York's attorney disciplinary regulations both facially and as applied. See Sassower 927 F. Supp. At 117-118."

(A) "..., **we disagree with Sassower's contentions of fact: we think that all of her present claims were raised in one form or another in the prior proceedings *[fn. 1]*..."**

> It is ludicrous for the panel to "disagree" when -- as hereinabove noted, Appellant did not contend on appeal that she was asserting claims not raised in the state forum. Moreover, by its footnote 1 cross-

reference to Appellant's constitutional challenge in her petition for certiorari, the panel demonstrates that it has gone outside Appellant's Complaint to dismiss it. The cert petition is not part of Appellant's Verified Complaint [R-23-100], having been written after the §1983 action was already commenced. This is highlighted in Appellant's Brief (11-12, fn. 4). The panel conceals this fact by not giving a citation to the cert petition in the record [R-303-439], but instead citing the District Judge's decision.

(B) **"...she now is 'effectively seek[ing] review of judgments of [the] state courts,'** Moccio, 95 F.3d at 197, **judgments that have deprived her of her license to practice law..."**

There are **no judgments** that have deprived Appellant of her license to practice law -- as **de novo** review of the record would have disclosed to the panel, had it undertaken such review. The Verified Complaint alleges that Appellant was suspended by a June 14, 1991 "interim" suspension Order -- a copy of which it annexed [R-96].

The **only** state court judgment that exists in the record arises from Appellant's post-suspension Article 78 proceeding against Defendant Second Department. As highlighted in Appellant's Brief (at 10, 74-75) and Reply (at 27-31), Defendant Second Department's judgment in that Article 78 proceeding [R-362] -- which the panel does not cite -- is not an adjudication responsive to the merits, was alleged by the Complaint to be a fraud [R-75: ¶182; R-77: ¶¶189-191; R-80-81: ¶¶291-202], and is a jurisdictional nullity because, by decisional law cited in the record

[R-333], Defendant Second Department was legally disqualified and without jurisdiction to render it, Colin v. Appellate Division, First Department, 3 A.D.2d 682, 159 N.Y.S.2d 99 (2d Dept. 1957), citing Smith v. Whitney, 116 U.S. 167 (1886).

Page 5 of the Panel's Summary Order:

Full Paragraph:

"**Examining Sassower's complaint** under **contemporary preclusion principles**, it is manifest that her present claims -- **as the district court determined** -- were effectively 'raised and denied in the state proceedings,' and consequently 'are inextricably intertwined with her particular case."

(A) "**Examining Sassower's complaint**"

The panel offers no evidence of any such examination -- failing to identify either the precise claims raised in any of the proceedings, the proceedings themselves, or the issues adjudicated therein. Any purported examination is belied by the allegations of the Verified Complaint -- none of which the panel cites.

(B) "**contemporary preclusion principles**"

The panel fails to specify the "contemporary preclusion principles" to which it is referring and does not identify any of the prerequisites to invocation of those principles. These prerequisites were set forth in Appellant's Memorandum of Law [R-471-476] in opposition to Defendants' dismissal motion and in support of her own summary

judgment application, were recited continually in the Brief (at 18, 65-66), and were particularized in Appellant's Reply Brief (at 26-32). The panel does not deny or dispute the correctness of the arguments and legal authority, set forth therein.

(C) "**as the district court determined**"

The District Judge did not make the essential determinations that prerequisites for preclusion had been met: due process, a full and fair opportunity to litigate, and adjudications responsive to the merits. The District Judge's failure to make such determinations -- and the complete unavailability of such determinations on this record -- is highlighted in Appellant's Reply Brief (at 9, 26-31).

Moreover, by relying on the District Judge's decision for preclusion [R-17], the Circuit panel is going outside the Complaint: the District Judge having granted summary judgment dismissal. Indeed, Appellant's cert petition, which the District Judge includes in his discussion of preclusion, is nowhere mentioned in Appellant's Verified Complaint. Additionally, the panel is affording preclusive effect to non-final orders, as well as the judgment in Appellant's Article 78 proceeding, which -- as a matter of law -- is a jurisdictional nullity (Br. 74; Reply Br. 28-29).

The panel -- like the District Judge -- does not identify that Appellant's Verified Complaint alleged that all proceedings in the state forum were tainted by bias and political motives by reason of Appellant's whistle-blowing challenge to the politicization of

judicial selection -- thereby denying her due process. Likewise the panel does not identify that the particularized allegations of Appellant's Verified Complaint, highlighted in her Brief (at 4-11), delineated outright fraud and criminality by Defendants, covered up by Defendant Second Department's failure and refusal to issue anything but unlawful and finding-less orders. (Reply Br. 27-28).

Like the District Judge, the panel does not address any of the evidence in the record -- all substantiating Appellant's allegations as to the denial of her due process and equal protection rights in the state forum.

(D) "**effectively** raised"

This phrase has a convenient double meaning, "**effectively**" may mean "essentially" or, it may imply, "with results" or "fully and fairly". By such ambiguity, the panel avoids making an actual finding of requisite due process in the prior proceedings affording Appellant a full and fair hearing or that there were any decisions responsive to the issues raised. As highlighted by Appellant's Reply Brief (at 27-28), Defendant Second Department has not issued any reasoned decisions, but rather, "peremptory orders setting forth no reasons at all". None of these have made "any finding as to [Appellant's] challenges to Defendant Second Department's impartiality, jurisdiction, or compliance with due process requirements". Appellant's Reply Brief (at 9) pointed out that the District Judge did not make any finding that Appellant was afforded "a full and fair opportunity" to litigate or the minimum due process standards governing state attorney

disciplinary proceedings, without which they are violative of federally-protected constitutional rights.

PETITIONER'S INCORPORATED-BY-REFERENCE §372(c) JUDICIAL MISCONDUCT COMPLAINT AGAINST U.S. DISTRICT JUDGE JOHN E. SPRIZZO, filed October 29, 1997 in the Second Circuit Court of Appeals, #97-8535

This is a complaint under 28 U.S.C. §372(c) against U.S. District Judge John E. Sprizzo of the Southern District of New York/Second Circuit for official misconduct in the §1983 civil rights-action, *Sassower v. Mangano, et al.*, #94 Civ. 4514 (JES). Such misconduct, spanning the course of the litigation, culminated in a *knowingly* false, fabricated, and fraudulent decision of dismissal, dated May 21, 1996 [R-4-21], which served to protect influential state defendants, including high-ranking state court judges and the New York State Attorney General, who had *no* legitimate defense to the particularized allegations of my Verified Complaint of their corruption [R-23-100]. They, therefore, founded their defense on a strategem of litigation misconduct, including fraud -- in which Judge Sprizzo was fully complicitous.

Throughout the course of the litigation and in his decision, Judge Sprizzo wilfully failed to adjudicate *any* of my several sanctions applications against defendants -- each documented, uncontroverted, and incontrovertible (Br. 38-50). These included my sanctions application: (1) for their dismissal motion, which obliterated and misrepresented the material allegations of my Verified Complaint and controlling law relative thereto; (2) for their Answer, which was false and in bad faith in response to *over 150* of the Complaint's allegations; (3) for their frivolous, irrelevant, and non-probative 2-1/2 page affidavit in opposition to my summary judgment application; and (4) for their counsel's fraudulent oral advocacy. Instead, Judge Sprizzo's decision deliberately omitted *any* mention of my unadjudicated sanctions applications, likewise obliterated and misrepresented my Complaint's material allegations[1] and controlling law relative thereto, and, *sua sponte* and *without* notice, converted

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[1] The deliberateness with which Judge Sprizzo's decision did this is highlighted by the Appendix to my Appellant's Brief, *infra*, annexed hereto as Exhibit "A".

defendants' dismissal motion to one for summary judgment in their favor, based on *no* evidence whatever[2] (Br. 64-75). *Without* reasons, his decision denied my summary judgment application -- which, like my sanctions applications, was fully-documented, uncontroverted, and incontrovertible and entitled me to relief, *as a matter of law* (Br. 61-64).

Also protected by Judge Sprizzo's deliberate dishonesty and willful perversion of elementary adjudicative standards were the judges of this Circuit, who had a direct, personal interest in ensuring that my law license -- the subject of the litigation -- was not restored to me and, with it, my good name. If decided on the facts and law, this case, involving the state defendants' misuse of New York's attorney disciplinary law to retaliate against me for my judicial whistle-blowing, would have resulted in their being criminally investigated, prosecuted, and removed from office, compensatory and punitive damages against them for millions of dollars, and a declaration that New York's attorney disciplinary law is unconstitutional. As such, the case stood to make front-page headlines and powerfully advance my judicial whistle-blowing advocacy. This includes my advocacy against judges of this Circuit stemming from their vicious judicial retaliation against me for NO reason other than my familial relationship with George Sassower[3].

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[2] The basis stated by Judge Sprizzo's decision for his *sua sponte* conversion was that "voluminous affidavits" had been filed by "both parties". In fact, defendants had filed *no* "voluminous affidavits". Their only affidavit -- 2-1/2 pages in length -- was the subject of my unadjudicated application for Rule 56(g) sanctions (Br. 58).

[3] This Circuit's judicial retaliation includes its imprimatur to the lawless and biased conduct of another district judge of the Southern District in a lawsuit against private defendants in which I was a co-plaintiff, *Sassower v. Field, et al.*, 88 Civ. 5775 (GLG). That lawsuit, wherein the defendants engaged in *unadjudicated* discovery misconduct, ended with a factually false, fabricated and legally insupportable decision imposing, *without* a hearing, a completely arbitrary $100,000 award of counsel fee/sanctions against me and my daughter -- which the Circuit sustained on appeal (#91-7891) under "inherent power", in a factually baseless and retaliatory decision, 975 F.2d 75 (1992), authored by Judge Jon Newman, which flew in the face of bedrock

Mr. Sassower is well known to this Circuit. He has repeatedly sued its judges and filed misconduct complaints against them, alleging that they render decisions, on both the district and appellate level, which fabricate facts and disregard controlling law so as to cover-up state court corruption in which the State Attorney General is an active, collusive participant. The publicity and soaring credibility I would have received as a result of a successful outcome to this lawsuit would have brought attention to this Circuit's previous retaliation against me -- with consequent investigation, prosecution, and removal from office of the federal judges involved -- and would necessarily have lent credibility to -- and examination of -- Mr. Sassower's long-standing allegations of corruption in the Circuit. Further, Mr. Sassower has also been a victim of New York's unconstitutional and judicially self-serving attorney disciplinary law -- and within that class of attorneys who would have benefited by a federal ruling on the unconstitutionality of reposing *all* aspects of New York attorney discipline in the state courts.

Judge Sprizzo's official misconduct in *Sassower v. Mangano, et al.* is readily verifiable from the record therein. Its brazenness leads to the inescapable conclusion that Judge Sprizzo knew he had nothing to fear from the Circuit, either by a direct appeal or by a §372(c) misconduct complaint, because he was advancing this Circuit's ulterior objectives. He certainly had nothing to fear from

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decisional law of the Supreme Court and of the Circuit and *never* once cited to the record or identified a single one of our appellate arguments -- each dispositive of our right to reversal, including the granting of our *fully-documented, uncontroverted* Rule 60(b)(3) motion for a new trial. This Circuit covered-up for Judge Newman and the district judge by denying our Petition for Rehearing with Suggestion for Rehearing *En Banc* and, thereafter, by upholding the dismissal of our fully-documented §372(c) complaint against then Chief Judge Newman (#96-8511), dismissed by a dishonest decision of Acting Chief Judge Amalya Kearse which falsely contended, *inter alia*, that it was "merits related", that the statute required dismissal of "merits-related" complaints, and that it was "unsupported. A copy of that complaint, Acting Chief Judge Kearse's dismissal, our petition for rehearing, and the Circuit Council's order affirming dismissal are annexed as Exhibits "C"-"F" to my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion.

the Chief Judge of the Southern District, Thomas Griesa, who failed to respond to my entreaties that he exercise supervisory power over Judge Sprizzo's "manifest bias [which] has caused him to run amok" (Br. 3). The record before Judge Sprizzo [R-502-3, R-558-572] showed that Judge Griesa, on behalf of the Southern District, had unlawfully suspended my federal law license, *without* a hearing, in violation of constitutional due process and in flagrant disregard of the Southern District's own Rule 4, which I had specifically invoked because defendant Second Department's "interim" suspension of my state law license was *without* written charges, *without* findings, *without* reasons, *without* a hearing -- either before or after -- and *without* any right of appellate review and was a malicious retaliation against me for my whistle-blowing against state judicial corruption and the manipulations by the major political parties of state judicial selection.

Judge Sprizzo's "pervasive bias"and fraudulent decision has already been the subject of a meticulously-documented appeal (#96-7805). In the interest of judicial economy, such appeal papers are incorporated by reference and made a part hereof. Included in the Record on Appeal is my Order to Show Cause for Judge Sprizzo's recusal, pursuant to §144 and §455 [R-643-733]. Judge Sprizzo denied it from the bench [R-762-765], with no written decision or order thereon, and, thereafter denied my subsequent motion for reargument, renewal, and reconsideration [R-743-864] as part of his dismissal decision. In that decision [R-13-14], Judge Sprizzo misrepresented both the recusal and reargument motions so as to justify having denied them -- and, likewise, misrepresented the nature and content of *all* other motion-submissions before him so as to conceal the egregiousness of his other adjudications. My sanctions applications he wholly omitted from his decision and the material allegations of my Complaint he obliterated and misrepresented, together with the controlling law relative thereto (Exhibit "A"). This flagrant dishonesty was highlighted in the five Points of my Appellant's Brief, whose *sole* overarching issue was:

> "As evidenced from the course of the proceedings and the subject Decision, should the District Judge have recused himself for bias?" (*See*, Appellant's Brief: Issues Presented for Review)

Point I of my Appellant's Brief (at 31-37) delineated my entitlement to the granting of my Order to Show Cause for recusal and of my reargument motion. It also noted (at 32-33) that even before the U.S. Supreme Court's decision in *Liteky v. United States*, 114 S.Ct. 1147 (1994), this Circuit had recognized that a judge's conduct of proceedings before him" can form the basis for a finding of bias, *United States v. Wolfson*, 558 F.2d 59, 63 (1977), *United States v. Coven*, 662 F.2d 162, 168 (1981), *In re IBM*, 618 F.2d 923, 928 (1980), citing *Wolfson v. Palmieri*, 396 F.2d 121, 124 (1968)[4].

Because of the deliberate and knowing nature of Judge Sprizzo's misconduct, my Appellant's Brief concluded (at 76) by requesting disciplinary and criminal referral of Judge Sprizzo, as well as of the defendants, with whom he had collusively engaged in fraudulent and corrupt conduct. However, as a result of the disqualifying bias of the Circuit panel assigned to this appeal, it complicitously covered up for Judge Sprizzo and did not rule upon the *sole*, transcending, and threshold issue of his pervasively-biased and corrupt conduct. Instead, its not-for publication, no-citation Summary Order, dated September 10, 1997, *expressly* did *not* adjudicate Judge Sprizzo's disposition on *any* of the motion-submissions before him -- including my recusal Order to Show Cause and reargument motion -- and *never* once cited to the record *or* referred to the allegations of my Complaint, expurgated by the appealed-from decision. This is particularized in my Petition for Rehearing with Suggestion for Rehearing *In Banc*, in my October 10, 1997 recusal/vacatur for fraud motion, as well as in my §372(c) complaint against the panel members -- all of which are incorporated by reference and made part hereof.

This complaint is properly cognizable under 28 U.S.C. §372(c). Judge Sprizzo's misconduct, although arising from a litigation and encompassing a judicial decision and rulings, is not "merits-related" because no adjudications were rendered "on the

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[4] *See* also *In re IBM*, 45 F.3d 641, 644 (1995), per Chief Judge Jon Newman, ""in the rarest circumstances' judicial rulings alone can warrant recusal..."

merits". No decision and rulings are being challenged as "erroneous" "good-faith" adjudications. What is here at issue is Judge Sprizzo's corrupt use of his judicial office to advance ulterior, illicit purposes *unrelated* to the merits of the proceedings before him. Such behavior, subverting "the effective and expeditious administration of the business of the courts", constitutes impeachable conduct. It is properly the subject of disciplinary review irrespective of whether judicial or appellate remedies exist. Moreover, under 28 U.S.C. §372(c), even "merits-related" complaints are reviewable since the language of the statute affords the Circuit discretion not to dismiss such complaints[5]. This discretion is particularly warranted where judicial and appellate remedies are unavailable -- or, as at bar, unavailing by reason of the protectionism and self-interest complained of.

Because of the *actual* bias of this Circuit, as particularized in my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion, and its palpable self-interest in covering up Judge Sprizzo's misconduct, this §372(c) complaint should be transferred to another Circuit. The §372(c) statute does *not* preclude transfer -- and recusal and transfer are always appropriate where judges are unable or unwilling to act impartially or where there is an "appearance of impropriety" -- as here.

Should the Chief Judge of another Circuit or the Acting Chief Judge of this Circuit[6] who initially reviews this fully-documented misconduct complaint nonetheless dismiss it as "merits-related", it should be by a fact-specific, responsive, non-conclusory order

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[5] This Circuit's rule 4(c)(2) requiring dismissal of "merits-related" complaints must be stricken as violative of the statute. See Exhibit "E", p. 4 to my October 10, 1997 recusal/vacatur for fraud motion, incorporated herein by reference.

[6] Chief Judge Winter is absolutely disqualified from reviewing this complaint since the allegations of corrupt and fraudulent decision-making herein raised mirror those in my previously-filed §372(c) complaint against then Chief Judge Jon Newman for his authorship of the fraudulent and retaliatory appellate decision in *Sassower v. Field*, *supra*. (*See* footnote 2, *supra*). Judge Winter was complicitous in that decision, being a member of the appellate panel, together with former Chief Judge Edward Lumbard.

addressed to the complaint's particulars. This would accord with the recommendation of the National Commission on Judicial Discipline and Removal -- endorsed by the Judicial Conference based on the recommendation of its Committee to Review Circuit Council Conduct and Disability Orders -- which calls for reasoned, non-conclusory dismissals, as well as the Commentary on Rule 4 of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, stating that the "statutory purposes" of §372(c) are best served when orders disposing of complaints are "relatively expansive". Indeed, likewise endorsed by the Judicial Conference, based on the recommendation of its Review Committee, is the National Commission's recommendation that the Circuits resolve the substantive ambiguity of §372(c) by creating a body of interpretive precedent. [For citations, *see* Exhibit "E", p. 1 to my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion].

Such interpretive precedent should provide definition of the "merits-related" category, specifically in the context of complaints alleging bad-faith, biased conduct that is egregious and part of a pattern of behavior, as well as illuminate its relationship to "normal adjudicative procedures", i.e., judicial and appellate remedies[7]. Heretofore, this Circuit has refused to provide such definition, either in connection with my previously-filed §372(c) complaint[8] or in response to the presentation made by the Center for Judicial Accountability, the organization of which I am co-founder and Director, to the Second Circuit's Task Force on Gender, Racial, and Ethnic Fairness in the Courts[9].

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[7] *See* "*Without Merit: The Empty Promise of Judicial Discipline*", by E. R. Sassower, The Long Term View (Massachusetts School of Law), Vol 1, No. 4, pp. 90-97, annexed hereto as Exhibit "B".

[8] *See* pp. 1-4 of my petition for rehearing on my prior §372(c) complaint, annexed as Exhibit "E" to my October 10, 1997 recusal/vacatur for fraud motion.

[9] *See* E. R. Sassower's November 28, 1995 testimony before the Task Force and her June 17, 1996 letter to it, annexed as Exhibits "A" and "B" to my April 28, 1997 Supplemental Affidavit in support of my April 1, 1997 recusal/sanctions motion.

The pattern of egregious and willful misconduct of Judge Sprizzo, as established by my *uncontroverted* Appellant's Brief[10], makes this the "rare case" anticipated by *In re Charge of Judicial Misconduct*, 685 F.2d 1226 (9th Cir. 1982), one where, additionally, his "improper motive" is both alleged and evidentiarily demonstrated:

> "We need not reject the possibility of an exceptional case developing where the nature and extent of the legal errors are so egregious that an inference of judicial misconduct might arise, but that would be a rare case, and it has not occurred here. We note, moreover, that there is neither an assertion or evidence that the judge acted with improper motive" at 1227.

The term, "prejudicial to the effective and expeditious administration of the business of the courts" -- the standard for discipline under §372(c) -- is to be considered in light of, *inter alia*, the relevant ABA Canons, as well as the Judicial Conference's Code of Judicial Conduct. [*See*, Research Papers of the National Commission on Judicial Discipline and Removal, Vol. 1: "*The Role of Judicial Ethics in the Discipline and Removal of Federal Judges*", at p. 882, citing Senate Report on §372(c) statute]. Judge Sprizzo's corrupt conduct violated the first three Canons of both the ABA and Judicial Conference's Codes. Particularly noteworthy is that both call upon a judge to take corrective steps in the face of misconduct -- be it by a lawyer or judge:

> "A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." Judicial Conference's Code of Judicial Conduct, Canon 3B(3).

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[10] My Appellant's Brief is uncontroverted inasmuch as defendants' Appellees' Brief did not deny *any* of the factual showing or respond to any of the legal argument presented therein. Indeed, it did not even refer to my Appellant's Brief! (*See* my Reply Brief, p. 2).

The overwhelming evidence in the record before Judge Sprizzo gave him more than "the likelihood" of defendants' unprofessional conduct. It presented him with indisputable proof of a pattern of unremitting fraud before him, as well as public corruption by high-ranking state officials in the state forum -- warranting his reporting defendants "to the appropriate authorities", pursuant to the Commentary to that Canon. ABA Canons 3D(1) and (2) are appropriately more forceful.

The Commentary to the Judicial Conference's Canon 1 recognizes that a judge's violations of its Code may serve as a basis for disciplinary action depending on such factors as their "seriousness", "the intent of the judge", "a pattern of improper activity, and their "effect...on others or on the judicial system". The record establishes that *all* such factors are resoundingly met.

PETITIONER'S INCORPORATED-BY-REFERENCE §372(c) JUDICIAL MISCONDUCT COMPLAINT AGAINST APPELLATE PANEL JUDGES, U.S. CIRCUIT JUDGE DENNIS JACOBS (#97-8539), U.S. DISTRICT JUDGE THOMAS J. MESKILL (#97-8540), AND U.S. DISTRICT JUDGE EDWARD R. KORMAN (#97-8541), filed November 28, 1997 in the Second Circuit Court of Appeals

PREFATORY NOTICE

Because of the *actual* bias and self-interest of this Circuit, as summarized herein and particularized in my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion (at pp. 5-40), which *expressly* seeks recusal of the Circuit as a whole and transfer of the appeal, this §372(c) complaint should be transferred to another Circuit. 28 U.S.C.§372(c) does *not* preclude transfer, and recusal and transfer are always appropriate where judges are unable or unwilling to act impartially or where there is an "appearance of impropriety" -- as here[1].

Under 28 U.S.C. §1254(2), the Circuits may certify questions to the U.S. Supreme Court as to which they desire instruction. Should there be any question as to this Circuit's duty to transfer this fully-documented complaint and the federal judiciary's supervisory and ethical obligation to investigate it, it should be certified to the U.S. Supreme Court, in conjunction with my intended petition for a writ of certiorari, and sent, as well, to the Judicial Conference for an

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[1] Chief Judge Ralph Winter is absolutely disqualified from reviewing this §372(c) complaint since the allegations herein of an appellate panel's fraudulent and retaliatory decision-making mirror those in my previously-filed §372(c) complaint against then Chief Judge Jon Newman (#96-8511) for his authorship of the fraudulent and retaliatory appellate decision in *Sassower v. Field*, 975 F.2d 75 (1992) (*See* discussion, *infra*). Judge Winter participated in the "shared enterprise of appellate decision-making", *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1985) -- having been a member of the appellate panel in *Sassower v. Field*, together with former Chief Judge Edward Lumbard.

advisory opinion, *inter alia*, to its Committee on Codes of Conduct[2] and its Committee to Review Circuit Council Conduct and Disability Orders.

* * *

This is a complaint of official misconduct under 28 U.S.C. §372(c) against U.S. Circuit Judges Dennis Jacobs and Thomas J. Meskill of the Court of Appeals for the Second Circuit and U.S. District Judge Edward R. Korman of the Eastern District of New York/Second Circuit. These three judges, constituting the Second Circuit appellate panel in *Sassower v. Mangano, et al.*, #96-7805, failed to disclose facts "relevant to the question of disqualification", as set forth in the record[1], and failed to disqualify themselves for apparent bias. They then manifested their actual bias by *corruptly using their position and authority* in connection with the August 29, 1997 oral argument -- wherein Presiding Judge Jacobs cut me off, mid-sentence, during my oral recusal application -- thereafter "throwing" the appeal by a knowingly false and fraudulent not-for-publication, no-citation Summary Order, dated September 10, 1997[2], in which they failed to adjudicate their bias -- or the sole, overarching

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[2] The Chairman of the Committee on Codes of Conduct of the Judicial Conference reported to the National Commission on Judicial Discipline and Removal that "[n]o Circuit Council has availed itself of advice from our Committee when responding to Section 372(c) complaints", Research Papers of the National Commission, Vol. I, p. 881, "*The Role of Judicial Ethics in the Discipline and Removal of Federal Judges*".

[1] *See* pp. 3-9 of my April 1, 1997 recusal/sanctions motion, referred to at fn. 1 of my Reply Brief.

[2] The fraudulent nature of the panel's Summary Order is highlighted by the Appendix, cross-referenced to the appellate record, which was Exhibit "N-1" to my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion, *infra*. A copy is annexed hereto as Exhibit "A".

issue presented by my *uncontroverted* Appellant's Brief[3]: the bias of the district judge.

The evidentiary record before the panel established that this was no ordinary appeal. At issue was the district judge's flagrant and pervasive bias, as manifested throughout the course of the proceeding and in his appealed-from false and fraudulent decision, whose consequence was to protect influential state defendants, sued for corruption. These defendants, among them, the judges of New York's Appellate Division, Second Department, had *no* defense to the allegations of my Verified Complaint of their criminal conduct and had, therefore, embarked upon a stratagem of defense misconduct, including fraud. Yet, the district judge not only deliberately failed to adjudicate *any* of my documented and uncontroverted sanctions applications against defendants, who were represented by the State Attorney General, himself a defendant, but obliterated the very existence of my sanctions applications from his decision dismissing the case. Such dismissal was by his *sua sponte* and *without* notice conversion of defendants' dismissal motion -- the subject of one of my unadjudicated sanctions applications -- into one for summary judgment in their favor, based on *no* evidence whatever. At the same time, the district judge denied, *without* reasons, my own fully-documented and uncontroverted summary judgment application -- as to which I was entitled to relief *as a matter of law*. Because of the purposefulness of the district judge's misconduct, acting in complicity with the State Attorney General to subvert the integrity of the judicial process, my Appellant's Brief (at 76) explicitly requested disciplinary and criminal referral against them.

The evidentiary record before the panel further showed that because defendants had *no* legitimate defense to the appeal, the Attorney General's office went on to pollute the appellate process with fraud and misconduct. This was with the knowledge of the Attorney General's supervisory staff and the Attorney General himself, who simply turned their back on their ethical and

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[3] My Appellant's Brief was uncontroverted inasmuch as defendants' Appellees' Brief did not deny *any* of the factual showing or respond to *any* of the legal argument presented therein. Indeed, it did not even refer to my Appellant's Brief! (*See* my Reply Brief, p. 2).

professional duty to take corrective steps. For this reason, my request for disciplinary and criminal referral against the Attorney General and his co-defendants was reinforced in my Reply Brief -- and, thereafter, in a separate motion, dated April 1, 1997, which particularized the Attorney General's subversion of the case **[p. 2]** management phase of the appeal. My evidentiary showing as to what had taken place on appeal, like my evidentiary showing as to what had taken place in the district court, was fully-documented, uncontroverted, and incontrovertible.

This overwhelming record of judicial/attorney misconduct imposed upon the panel a transcendent ethical duty superior to, and separate from, the substantive merits of the litigation: to insure the integrity of the judicial process. This is a duty not confined to appellate judges, but is the obligation of every judge. Embodied in the Judicial Conference's Code of Judicial Conduct, Canon 3B(3) -- and articulated even more forcefully in ABA Canon 3D, entitled, "Disciplinary Responsibilities"-- a judge is expected, even required, to take "appropriate action" in the face of violations of professional codes and rules by another judge or by a lawyer. This duty is all the greater when the perverters of the judicial process are a U.S. district judge and New York's highest law enforcement officer, the State Attorney General.

These transcending appellate issues relating to the integrity of the judicial process, trashed by the district judge and New York's Attorney General, were featured in a public interest ad, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", published in the August 27, 1997 New York Law Journal (Exhibit "B-1"), two days before oral argument of the appeal. Yet, the panel's response to this reminder of what the appellate record showed was its paramount ethical duty was to disregard that duty -- both at the oral argument and in its Summary Order. By that Order, the panel ignored, *without* adjudication, the record-evidence of *two* levels of defense misconduct and fraud -- as if it did not exist -- and ignored, *without* adjudication, the record evidence of the district judge's misconduct and fraud -- as if it did not exist. Instead, and without adjudicating *any* of the district judge's dispositions of the motion-submissions before him, the panel fashioned its own *sua sponte* dismissal of my Verified Complaint based on *Rooker-Feldman* and *unspecified* preclusion principles -- grounds shown by my appeal to

be *inapplicable* to the Complaint's material allegations -- *all* of which the Summary Order purposefully expurgated[4]. Such expurgation replicated the fraud perpetrated by defendants in their dismissal motion and, thereafter, by the district judge in his decision -- a fraud whose significance had been highlighted over and again in my Brief, Reply and April 1, 1997 motion.

The panel's willful perversion of the appellate process and disregard of its ethical duties -- in the face of the appalling record before it -- lends support to the view that the district judge's brazenness in perverting the judicial process and disregarding his ethical duties was due to his knowledge that the Circuit would let him "get away with it" because he was advancing Circuit objectives[5]. These objectives were: (1) to protect influential state defendants -- including high-ranking state judges -- with whom this Circuit's judges, presumably, have personal and professional relationships; (2) to retaliate **[p. 3]** against me because of my familial relationship to George Sassower, a long-standing judicial whistle-blower, who has brought numerous lawsuits and misconduct complaints against this Circuit's judges, alleging that they author dishonest decisions, which falsify facts and disregard controlling law, so as to cover-up state court corruption in which the Attorney General is an active and complicitous participant; and (3) to retaliate against me for my own whistleblowing advocacy, including against this Circuit by my testimony before the National Commission on Judicial Discipline and

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[4] Some of those material allegations appeared in the August 27, 1997 ad, which described defendant Second Department's politically-motivated, retaliatory, due process-less suspension of my law license, its subversion of the Article 78 remedy by its refusal to recuse itself, and its blocking of appellate review by the New York Court of Appeals through fraud. As the ad reflects, these allegations were featured in a prior ad, "*Where Do You Go When Judges Break the Law?*", published on the Op-Ed page of the October 26, 1994 New York Times (Exhibit "B-2") and thereafter in the November 1, 1994 New York Law Journal. That earlier ad was part of the record before the panel when it decided the appeal [R-606].

[5] The panel may well have feared that if it referred the district judge for disciplinary and criminal investigation, he would have implicated the Circuit in his misconduct.

Removal (7/14/93), the Long Range Planning Committee of the Judicial Conference (12/9/94), and the Circuit's own Task Force on Gender, Racial, and Ethnic Fairness in the Courts (11/28/95) (Br. 3, R-890], exposing the Circuit's prior retaliation against me based solely on my familial relationship to Mr. Sassower.

This prior judicial retaliation was the Circuit's false and fraudulent decision in *Sassower v. Field*, 975 F.2d 75 (1992), upholding, by its own *sua sponte* invocation of the district judge's inherent power, a completely arbitrary, *without*-a-hearing, $100,000 sanctions award against me and my daughter in favor of fully-insured private defendants for whom it was a windfall double-recovery, where the record was devoid of *any* factual or legal basis on which to found a sanctions award against us. Indeed, the decision, authored by Judge Jon Newman, *never* once cited the record or identified *any* of our appellate arguments -- among them, the flagrant bias of the district judge -- each dispositive of our right to reversal, including a new trial based on our fully-documented and uncontroverted Rule 60(b)(3) motion. It also included the Southern District's unlawful suspension of my federal law license[6], *without* a hearing, in violation of my constitutional rights and Rule 4 [R-502-3, R-558-572, R-904-7], which I had *expressly* invoked because the Second Department had suspended my state law license *without* notice of charges, *without* reasons, *without* findings, *without* a hearing -- either before or after -- and *without* any right of appellate review -- in retaliation for my whistle-blowing against state judicial corruption and the manipulation of state judicial selection by the major political parties. Thus, this Circuit had already demonstrated its own retaliatory interest in depriving me of my financial assets, my good-name, and my license to practice law -- *all* of which were at issue in the case and on the appeal herein.

If decided by a fair and impartial tribunal -- which the panel

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[6] As set forth at pp. 4-5 of my prior §372(c) complaint against then Chief Judge Newman for his authorship of the fraudulent, retaliatory decision in *Sassower v. Field*, I have reason to believe he was involved behind-the scenes in the Southern District's suspension of my federal law license. That complaint is Exhibit "C" to my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion.

did *not* purport itself or the district court to be -- this case would have necessarily resulted in immediate restoration of my law license, a multi-million dollar award of compensatory and punitive damages from the state defendants -- with disciplinary and criminal referral against them for their official misconduct -- and a declaration of the unconstitutionality of New York's attorney disciplinary law. Many days of front-page headlines would have ensued, particularly in the wake of defendants' criminal prosecution and removal from office. This would have catapulted me and my judicial whistle-blowing activities into the media spotlight and brought examination of my charges against the federal judiciary. Investigation, prosecution, and removal of the federal judges involved in the Circuit's *readily-verifiable* prior retaliation against me would have followed -- lending credibility to and investigation of Mr. Sassower's allegations of this Circuit's protectionism of state court judges and of the Attorney General, sued for corruption. Two members of the panel were involved in that protectionism: Circuit Judge Thomas Meskill -- whose cover-up of state judicial corruption by a dishonest decision had been the subject of Mr. Sassower's first §372(c) misconduct complaint -- as well as District Judge Edward Korman, who had dismissed two of **[p. 4]** Mr. Sassower's state court corruption cases[7]. For this reason, it was a matter of obvious self-interest[8] for the panel to "throw" the appeal -- which could only be done if it willfully disregarded its statutory and ethical duty to disqualify itself for bias under 28 U.S.C. §455, Canons 3C(1) and D of the Code of Conduct for U.S. Judges, and Canon 3E and F of the ABA Code of Judicial

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[7] Mr. Sassower's first §372(c) complaint against, *inter alia*, Judge Meskill, as well as the Circuit's affirmances of Mr. Sassower's appeals from two cases in which Judge Korman was the district judge, are annexed as Exhibits "G" and "I-1" and "I-2", respectively, to my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion.

[8] "...an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually obtained in that proceeding." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1985) citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *In re Murchison*, 349 U.S. 133 (1955).

Conduct.

Incorporated herein by reference is the appellate record in *Sassower v. Mangano, et al.*, #96-7805 -- from which the panel's misconduct is *readily verifiable*. It includes my fact-specific, fully-documented 43-page affidavit in support of my October 10, 1997 motion for the panel's recusal for bias and for vacatur of its Summary Order for fraud. Annexed thereto as Exhibit "K" is the transcript of the August 29, 1997 oral argument, comprehensively analyzed by my affidavit (at pp. 15-32), which also analyzed (at pp. 32-37) the Summary Order and annexed a 13-page Appendix (Exhibit "N-1") (Exhibit "A" hereto) establishing -- line-by-line -- with meticulous cross-referencing to the record -- that the Order is a knowing deceit and fraud. Notwithstanding such document-supported analysis and the fact that the motion was completely unopposed by defendants, the panel disposed of it by a one-word October 22, 1997 Order, "DENIED". The panel, thereby, demonstrated that it could not articulate *any* factual or legal basis for its denial, because there is none[9]. As such, the October 22, 1997 Order is not a "good faith" adjudication and constitutes further misconduct by the panel.

Where, as at bar, a recusal application is "not frivolous or fanciful, but substantial and formidable"[10], it is misconduct for judges to deny it *without any reasons or findings as to its sufficiency*. It is certainly misconduct *per se* for judges not to confront bias issues squarely before them for adjudication -- as they were before the panel on this appeal. The very purpose of §455(a) -- codifying the Canons -- was "to promote public confidence in the integrity of the judicial process", *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1987), citing both Senate and House reports. Indeed, a judge's obligations thereunder are self-executing and do not even

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[9] Nor was there any factual or legal basis for the one-word denial of my April 1, 1997 recusal/sanctions motion by a three-judge panel consisting of Judge Amalya Kearse, as Presiding Judge, and Judges Guido Calabresi and Louis Oberdorfer.

[10] *Cf. Berger v. United States*, 41 S.Ct. 230, 233 (1921), where the issue -- which the Circuit Court certified to the Supreme Court -- was the sufficiency of an affidavit for recusal made under the predecessor statute to the present 28 U.S.C. §144.

require the filing of an affidavit. Nor do they require a showing of actual bias -- as here present -- but only the "appearance" of impropriety. *Aetna v. Lavoie*, *infra*. *See*, also, "*Statutory Disqualification of Federal Judges*", David C. Hjelmfelt, Kansas Law Review, Vol. 30, pp. 255-263 (1982); Judicial Disqualification, Richard E. Flamm, Little Brown & Co., 1996, pp. 739-761.

[p. 5] My October 10, 1997 recusal/vacatur for fraud motion should be the starting point for evaluating the panel's failure to perform its duty to have recused itself for both apparent and actual bias and its willful and continuing fraud. Incorporated in that motion (at p. 2) is my Petition for Rehearing with Suggestion for Rehearing *In Banc* -- which the panel did *not* deny when it denied the motion. I do not know whether the panel has since denied the Petition because, following the October 28, 1997 filing of my §372(c) complaint against the district judge (#97-8535), the case management office abruptly ceased providing me with information as to its status, as it had prior thereto. My October 10, 1997 recusal/vacatur for fraud motion also incorporated (at p. 2) that §372(c) complaint and, as such, it is incorporated herein.

This complaint is properly cognizable under the §372(c) statute for all the reasons set forth in my incorporated-by-reference §372(c) complaint against the district judge -- which should be deemed a "companion" complaint. It is not "merits-related", because no "good-faith" adjudications are here involved, but a deliberate misuse of judicial power by a biased Circuit panel -- which knowingly failed to adjudicate the threshold bias issues because it was intent on advancing ulterior and illicit purposes. The panel's demonstrably fraudulent September 10, 1997 Summary Order -- be it to cover up state judicial corruption, to retaliate against a judicial whistle-blower, or to forestall exposure of corruption in the Circuit -- subverts the "effective and expeditious administration of the business of the courts". Its one-word October 22, 1997 Order only reinforces the impeachable nature of its conduct. This is properly the subject of disciplinary review, irrespective of whether appellate or judicial remedies exist. Moreover, under 28 U.S.C. §372(c), even "merits-related" complaints are reviewable, since the statute affords discretion *not* to dismiss such complaints.

By my October 10, 1997 recusal/vacatur for fraud motion and by my Petition for Rehearing with Suggestion for Rehearing *In Banc*,

I have already availed myself of the available judicial remedies. It remains to be seen what the Circuit's response will be to my Petition for Rehearing -- which incorporates (at p. 15) the recusal/vacatur for fraud motion, this §372(c) complaint, and my companion §372(c) complaint against the district judge. Other than that, there is no appellate review as of right -- the only review being discretionary review by the U.S. Supreme Court -- which is a statistical impossibility -- a fact highlighted in my Brief (at 73-74) in the context of my *Rooker-Feldman* arguments, which the Summary Order did not address.

Should this fully-documented misconduct complaint nonetheless be dismissed as "merits-related", it should be by a fact-specific, responsive, non-conclusory order addressed to the complaint's particulars, as recited in my companion complaint against the district judge. Both complaints are well suited to standing as interpretive precedent and any dismissal should provide definition of the "merits-related" category in the specific context of complaints alleging bad-faith, biased conduct that is egregious, and illuminate its relationship to "normal adjudicative procedures", i.e., judicial and appellate remedies[11]. Should it be maintained that the sole avenue for review of deliberate, on-the-bench misconduct by Circuit judges is in the U.S. Supreme Court -- and if not there, nowhere -- then the dismissal order should state as much so that the Supreme Court can more fully appreciate -- and make appropriate provision for -- its transcendant appellate and supervisory obligation -- without which there is no disciplinary review by the Circuit.

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[11] *See* "*Without Merit: The Empty Promise of Judicial Discipline*", E. R. Sassower, The Long Term View , Vol. 1, No. 4 , pp. 90-97 (1997) (Exhibit "C"). *See also*, "*Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*", Anthony D'Amato, Michigan Law Review Vol. 89:609-623 (1990).

EXHIBIT "B-1" TO PETITIONER'S §372(c) COMPLAINTS AGAINST THE APPELLATE PANEL

Advertisement: New York Law Journal, August 27, 1997, p. 3

RESTRAINING "*LIARS IN THE COURTROOM*" AND ON THE PUBLIC PAYROLL

On June 17th, The New York Law Journal published a Letter to the Editor from a former New York State Assistant Attorney General, whose opening sentence read "Attorney General Dennis Vacco's worst enemy would not suggest that he tolerates unprofessional or irresponsible conduct by his assistants after the fact". Yet, more than three weeks earlier, the Center for Judicial Accountability, Inc. (CJA), a non-partisan, non-profit citizens' organization, submitted a proposed Perspective Column to the Law Journal, detailing the Attorney General's knowledge of, and complicity in, his staff's litigation misconduct -- before, during, and after the fact. The Law Journal refused to print it and refused to explain why. Because of the transcending public importance of that proposed Perspective Column, CJA has paid $3,077.22 so that you can read it. It appears today on page 4.

New York Law Journal, August 27, 1997, p. 4

RESTRAINING "*LIARS IN THE COURTROOM*" AND ON THE PUBLIC PAYROLL

-- a $3,077.22 ad presented, in the public interest, by the Center for Judicial Accountability, Inc. --
(continued from page 3)

In his May 16th Letter to the Editor, Deputy State Attorney General Donald P. Berens, Jr. emphatically asserts, "the Attorney General does not accept and will not tolerate unprofessional or irresponsible conduct by members of the Department of Law."

A claim such as this plainly contributes to the view -- expressed in Matthew Lifflander's otherwise incisive Perspective Column "*Liars Go Free in the Courtroom*" 2/24/97) -- that the State Attorney General should be in the forefront in spearheading reform so that the perjury which "pervades the judicial system" is investigated and deterrent mechanisms established. In Mr. Lifflander's judgment, "the issue is timely and big enough to justify creation of either a state Moreland Act Commission investigation by the Governor and the Attorney General, or a well-financed legislative investigation at the state or federal level", with "necessary subpoena power". Moreover, as recognized by Mr. Lifflander and in the two published letter responses (3/13/97, 4/2/97), judges all too often fail to discipline and sanction the perjurers who pollute the judicial process.

In truth, the Attorney General, our state's highest law enforcement officer, lacks the conviction to lead the way in restoring standards fundamental to the integrity of our judicial process. His legal staff are among the most brazen of liars who "go free in the courtroom". Both in state and federal court, his Law Department relies on litigation misconduct to defend state agencies and officials sued for official misconduct, including corruption, where it has *no* legitimate defense. It files motions to dismiss on the pleadings which falsify, distort, or omit the pivotal pleaded allegations or which

improperly argue *against* those allegations, without *any* probative evidence whatever. These motions also misrepresent the law or are unsupported by law. Yet, when this defense misconduct -- readily verifiable from litigation files -- is brought to the Attorney General's attention, he fails to take any corrective steps. This, notwithstanding the misconduct occurs in cases of great public import. For its part, the courts -- state and federal -- give the Attorney General a "green light."

Ironically, on May 14th, just two days before the Law Journal published Deputy Attorney General Berens' letter, CJA testified before the Association of the Bar of the City of New York, then holding a hearing about misconduct by state judges and, in particular, about the New York State Commission on Judicial Conduct. The Law Journal limited its coverage of this important hearing to a three-sentence blurb on its front-page news "Update" (5/15/97).

Our testimony described Attorney General Vacco's defense misconduct in an Article 78 proceeding in which we sued the Commission on Judicial Conduct for corruption (N.Y. Co. #95-109141). Law Journal readers are already familiar with that public interest case, spearheaded by CJA. On August 14, 1995, the Law Journal printed our Letter to the Editor about it, "*Commission Abandons Investigative Mandate*" and, on November 20, 1996, printed our $1,650 ad, "*A Call for Concerted Action*".

The case challenged, *as written and as applied*, the constitutionality of the Commission's self-promulgated rule, 22 NYCRR §7000.3, by which it has converted its mandatory duty under Judiciary Law §44.1 to investigate facially-meritorious judicial misconduct complaints into a discretionary option, unbounded by *any* standard. The petition alleged that since 1989 we had filed eight facially-meritorious complaints "of a profoundly serious nature -- rising to the level of criminality, involving corruption and misuse of judicial office for ulterior purposes -- mandating the ultimate sanction of removal". Nonetheless, as alleged, each complaint was dismissed by the Commission, *without* investigation, and *without* the determination required by Judiciary Law §44.1(b) that a complaint so-dismissed be "on its face lacking in merit". Annexed were copies of the complaints, as well as the dismissal letters. As part of the petition, the Commission was requested to produce the record, including the evidentiary proof submitted with the complaints. The

petition alleged that such documentation established, "*prima facie*, [the] judicial misconduct of the judges complained of or probable cause to believe that the judicial misconduct complained of had been committed".

Mr. Vacco's Law Department moved to dismiss the pleading. Arguing *against* the petition's specific factual allegations, its dismissal motion contended -- *unsupported* by legal authority -- that the facially irreconcilable agency rule is "harmonious" with the statute. It made no argument to our challenge to the rule, *as applied*, but in opposing our Order to Show Cause with TRO falsely asserted -- *unsupported* by law or *any* factual specificity -- that the eight facially-meritorious judicial misconduct complaints did not have to be investigated because they "did not on their face allege judicial misconduct". The Law Department made no claim that any such determination had ever been made by the Commission. Nor did the Law Department produce the record -- including the evidentiary proof supporting the complaints, as requested by the petition and further reinforced by separate Notice.

Although CJA's sanctions application against the Attorney General was fully documented and uncontroverted, the state judge did not adjudicate it. Likewise, he did not adjudicate the Attorney General's duty to have intervened on behalf of the public, as requested by our formal Notice. Nor did he adjudicate our formal motion to hold the Commission in default. These threshold issues were simply obliterated from the judge's decision, which concocted grounds to dismiss the case. Thus, to justify the rule, *as written*, the judge advanced his own interpretation, falsely attributing it to the Commission. Such interpretation, belied by the Commission's own definition section to its rules, does nothing to reconcile the rule with the statute. As to the constitutionality of the rule, *as applied*, the judge baldly claimed what the Law Department never had: that the issue was "not before the court". In fact, it was squarely before the court -- but adjudicating it would have exposed that the Commission was, as the petition alleged, engaged in a "pattern and practice of protecting politically-connected judges...shield[ing them] from the disciplinary and criminal consequences of their serious judicial misconduct and corruption".

The Attorney General is "the People's lawyer", paid for by the taxpayers. Nearly two years ago, in September 1995, CJA

demanded that Attorney General Vacco take corrective steps to protect the public from the combined "double-whammy" of fraud by the Law Department and by the court in our Article 78 proceeding against the Commission, as well as in a prior Article 78 proceeding which we had brought against some of those politically-connected judges, following the Commission's wrongful dismissal of our complaints against them. It was not the first time we had apprised Attorney General Vacco of that earlier proceeding, involving perjury and fraud by his two predecessor Attorneys General. We had given him written notice of it a year earlier, in September 1994, while he was still a candidate for that high office. Indeed, we had transmitted to him a full copy of the litigation file so that he could make it a campaign issue -- which he failed to do.

Law Journal readers are also familiar with the serious allegations presented by that Article 78 proceeding, raised as an essential campaign issue in CJA's ad "*Where Do You Go When Judges Break the Law?*". Published on the Op-Ed page of the October 26, 1994 New York Times, the ad cost CJA $16,770 and was reprinted on November 1, 1994 in the Law Journal, at a further cost of $2,280. It called upon the candidates for Attorney General and Governor "to address the issue of judicial corruption". The ad recited that New York state judges had thrown an Election Law case challenging the political manipulation of elective state judgeships and that other state judges had viciously retaliated against its "judicial whistle-blowing", *pro bono* counsel, Doris L. Sassower, by suspending her law license immediately, indefinitely, and unconditionally, *without* charges, *without* findings, *without* reasons, and *without* a pre-suspension hearing, -- thereafter denying her *any* post-suspension hearing and *any* appellate review.

Describing Article 78 as the remedy provided citizens by our state law "to ensure independent review of governmental misconduct", the ad recounted that the judges who unlawfully suspended Doris Sassower's law license had refused to recuse themselves from the Article 78 proceeding she brought against them. In this perversion of the most fundamental rules of judicial disqualification, they were aided and abetted by their counsel, then Attorney General Robert Abrams. His Law Department argued, *without* legal authority, that these judges of the Appellate Division, Second Department were not disqualified from adjudicating their own

case. The judges then granted their counsel's dismissal motion, whose legal insufficiency and factual perjuriousness was documented and uncontroverted in the record before them. Thereafter, despite repeated and explicit written notice to successor Attorney General Oliver Koppell that his judicial clients' dismissal decision "was and is an outright lie", his Law Department opposed review by the New York Court of Appeals, engaging in further misconduct before that court, constituting a deliberate fraud on that tribunal. By the time a writ of certiorari was sought from the U.S. Supreme Court, Mr. Vacco's Law Department was following in the footsteps of his predecessors (AD 2nd Dept. #93-02925; NY Ct. of Appeals: Mo. No. 529, SSD 41; 933; US Sup. Ct. #94-1546).

Based on the "hard evidence" presented by the files of these two Article 78 proceedings, CJA urged Attorney General Vacco to take immediate investigative action and remedial steps since what was at stake was not only the corruption of two vital state agencies -- the Commission on Judicial Conduct and the Attorney General's office -- but of the judicial process itself.

What has been the Attorney General's response? He has ignored our voluminous correspondence. Likewise, the Governor, Legislative leaders, and other leaders in and out of government, to whom we long ago gave copies of one or both Article 78 files. No one in a leadership position has been willing to comment on either of them.

Indeed, in advance of the City Bar's May 14th hearing, CJA challenged Attorney General Vacco and these leaders to deny or dispute the file evidence showing that the Commission is a beneficiary of fraud, without which it could *not* have survived our litigation against it. None appeared -- except for the Attorney General's client, the Commission on Judicial Conduct. Both its Chairman, Henry Berger, and its Administrator, Gerald Stern, conspicuously avoided making *any* statement about the case -- although each had received a personalized written challenge from CJA and were present during our testimony. For its part, the City Bar Committee did not ask Mr. Stern *any* questions about the case, although Mr. Stern stated that the sole purpose for his appearance was to answer the Committee's questions. Instead, the Committee's Chairman, to whom a copy of the Article 78 file had been transmitted more than three months earlier -- but, who, for reasons he *refused* to identify, did *not*

disseminate it to the Committee members -- abruptly closed the hearing when we rose to protest the Committee's failure to make such inquiry, the importance of which our testimony had emphasized.

Meantime, in a §1983 federal civil rights action (*Sassower v. Mangano, et al*, #94 Civ. 4514 (JES), 2nd Cir. #96-7805), the Attorney General is being sued as a party defendant for subverting the state Article 78 remedy and for "complicity in the wrongful and criminal conduct of his clients, whom he defended with knowledge that their defense rested on perjurious factual allegations made by members of his legal staff and wilful misrepresentation of the law applicable thereto". Here too, Mr. Vacco's Law Department has shown that there is no depth of litigation misconduct below which it will not sink. Its motion to dismiss the complaint falsified, omitted and distorted the complaint's critical allegations and misrepresented the law. As for its Answer, it was "knowingly false and in bad faith" in its responses to *over 150* of the complaint's allegations. Yet, the federal district judge did not adjudicate our fully-documented and uncontroverted sanctions applications. Instead, his decision, which obliterated any mention of it, *sua sponte*, and *without* notice, converted the Law Department's dismissal motion into one for summary judgment for the Attorney General and his co-defendant high-ranking judges and state officials -- where the record is wholly devoid of *any* evidence to support anything but summary judgment in favor of the plaintiff, Doris Sassower -- which she expressly sought.

Once more, although we gave particularized written notice to Attorney General Vacco of his Law Department's "fraudulent and deceitful conduct" and the district judge's "complicity and collusion", as set forth in the appellant's brief, he took no corrective steps. To the contrary, he tolerated his Law Department's further misconduct on the appellate level. Thus far, the Second Circuit has maintained a "green light". Its one-word order "DENIED", *without* reasons, our fully-documented and uncontroverted sanctions motion for disciplinary and criminal referral of the Attorney General and his Law Department. Our perfected appeal, seeking similar relief against the Attorney General, as well as the district judge, is to be argued **THIS FRIDAY, AUGUST 29TH**. It is a case that impacts on every member of the New York bar -- since the focal issue presented is the unconstitutionality of New York's attorney disciplinary law, *as*

written and as applied. You're all invited to hear Attorney General Vacco *personally* defend the appeal -- if he dares!

We agree with Mr. Lifflander that "what is called for now is action". Yet, the impetus to root out the perjury, fraud, and other misconduct that imperils our judicial process is not going to come from our elected leaders -- least of all from the Attorney General, the Governor, or Legislative leaders. Nor will it come from the leadership of the organized bar or from establishment groups. Rather, it will come from *concerted* citizen action and the power of the press. For this, we do not require subpoena power. We require only the courage to come forward and publicize the readily-accessible case file evidence -- *at our own expense, if necessary*. The three above-cited cases -- *and this paid ad* -- are powerful steps in the right direction.

Governmental integrity cannot be preserved if legal remedies, designed to protect the public from corruption and abuse, are subverted. And when they are subverted by those on the public payroll, including by our State Attorney General and judges, the public needs to know about it and take action. That's why we've run this ad. Your tax-deductible donations will help defray its cost and advance CJA's vital public interest work.

CENTER FOR JUDICIAL ACCOUNTABILITY, Inc.

Box 69, Gedney Station, White Plains, N.Y. 10605
Tel: **914-421-1200** ***Fax:*** **914-428-4994**
***E-Mail*: judgewatch@aol.com**
On the Web: **www.judgewatch.org**

EXHIBIT "B-2" TO PETITIONER'S §372(c) COMPLAINTS AGAINST THE APPELLATE PANEL

Ad: **[Also in the record before the District Judge, R-606]**
The New York Times, October 26, 1994, Op-Ed page
New York Law Journal, November 1, 1994, p. 9

Where Do You Go When Judges Break the Law?

From the way the current electoral races are shaping up, you'd think judicial corruption isn't an issue in New York. Oh really?

On June 14, 1991, a New York State court suspended an attorney's license to practice law -- immediately, indefinitely and unconditionally. The attorney was suspended with no notice of charges, no hearing, no findings of professional misconduct and no reasons. All this violates the law and the court's own explicit rules.

Today, more than three years later, the suspension remains in effect, and the court refuses even to provide a hearing as to the basis of the suspension. No appellate review has been allowed.

Can this really happen here in America? It not only can, it did.

The attorney is Doris L. Sassower, renowned nationally as a pioneer of equal rights and family law reform, with a distinguished 35-year career at the bar. When the court suspended her, Sassower was *pro bono* counsel in a landmark voting rights case. The case challenged a political deal involving the "cross-endorsement" of judicial candidates that was implemented at illegally conducted nominating conventions.

Cross-endorsement is a bartering scheme by which opposing political parties nominate the same candidates for public office, virtually guaranteeing their election. These "no contest" deals frequently involve powerful judgeships and turn voters into a rubber stamp, subverting the democratic process. In New York and other states, judicial cross endorsement is a way of life.

One such deal was actually put into writing in 1989. Democratic and Republican party bosses dealt out seven judgeships overs a three-year period. "The Deal" also included a provision that

one cross-endorsed candidate would be "elected" to a 14-year judicial term, then resign eight months after taking the bench in order to be "elected" to a different, more patronage-rich judgeship. The result was a musical-chairs succession of new judicial vacancies for other cross-endorsed candidates to fill.

Doris Sassower filed a suit to stop this scam, but paid a heavy price for her role as a judicial whistle-blower. Judges who were themselves the products of cross-endorsement dumped the case. Other cross-endorsed brethren on the bench then viciously retaliated against her by suspending her law license, putting her out of business overnight.

Our state law provides citizens a remedy to ensure independent review of governmental misconduct. Sassower pursued this remedy by a separate lawsuit against the judges who suspended her license.

That remedy was destroyed by those judges who, once again, disobeyed the law -- this time, the law prohibiting a judge from deciding a case to which he is a party and in which he has an interest. Predictably, the judges dismissed the case against themselves.

New York's Attorney General, whose job includes defending state judges sued for wrongdoing, argued to our state's highest court that there should be no appellate review of the judges' self-interested decision in their own favor.

Last month, our state's highest court -- on which cross-endorsed judges sit -- denied Sassower any right of appeal, turning its back on the most basic legal principle that "no man shall be the judge of his own cause." In the process, that court gave its latest demonstration that judges and high-ranking state officials are above the law.

Three years ago this week, Doris Sassower wrote to Governor Cuomo asking him to appoint a special prosecutor to investigate the documented evidence of lawless conduct by judges and the retaliatory suspension of her license. He refused. Now, all state remedies have been exhausted.

There is still time in the closing days before the election to demand that candidates for Governor and Attorney General address the issue of judicial corruption, which is real and rampant in this state.

Where do you go when judges break the law? You go public. Contact us with horror stories of your own.

CENTER FOR JUDICIAL ACCOUNTABILITY ...

The Center for Judicial Accountability, Inc. is a national, non-partisan, not-for-profit citizens' organization raising public consciousness about how judges break the law and get away with it.

PETITIONER'S PETITION FOR REVIEW TO THE SECOND CIRCUIT JUDICIAL COUNCIL OF CHIEF JUDGE WINTER'S ORDER DISMISSING HER §372(c) COMPLAINTS AGAINST THE DISTRICT JUDGE AND APPELLATE PANEL, filed April 3, 1998 in the Second Circuit Court of Appeals

Pursuant to 28 U.S.C. §372(c)(10) and Rule 5 of the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers under 28 U.S.C. §372(c), I hereby petition the Judicial Council of the Second Circuit for review of the order of Chief Judge Ralph Winter, dismissing my above-cited four judicial misconduct complaints. This petition supersedes the draft filed on March 25, 1998, under an explanatory Notice that it was to be considered only if the Clerk did not accord me an extension of time pursuant to Rule 7(c), as requested in my March 23, 1998 letter. By letters from the Clerk's office, dated March 25, 1998 and March 26, 1998, I was informed that my March 23, 1998 letter had been filed as my petition for review and that the Notice would also be passed to the Judicial Council[1]. This statement is as "brief" as possible -- considering the massive misconduct reflected by Chief Judge Winter's dismissal order -- and its public interest significance.

Chief Judge Winter's dismissal order exemplifies the same kind of pernicious judicial misconduct as was the subject of my §372(c) complaints: It is a *knowingly dishonest* decision by a judge who has:

(1) failed to disclose facts bearing upon his lack of impartiality, as is his statutory *sua sponte* obligation under 28 U.S.C. §455(e) and his ethical obligation under Canon 3D of the Code of Conduct for U.S. Judges and Canon 3F of the ABA Code of Judicial Conduct;

(2) ignored, *without* any adjudication, the threshold issue of

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[1] Alternatively, I request that this finalized petition be considered a "supplement" to that March 25, 1998 filing -- there being no bar to such supplements in this Circuit's aforesaid Rules.

his disqualification for bias and self-interest, as *explicitly* presented by my complaints; **[p. 2]**

(3) ignored, *without* any adjudication, the threshold issue of the Circuit's disqualification for bias and self-interest, also *explicitly* presented by my complaints; and

(4) flouted the directives of the Judicial Conference and National Commission on Judicial Discipline and Removal, as *explicitly* highlighted by my complaints, calling upon Chief Judges who dismiss §372(c) complaints to do so by non-conclusory orders which address "the substantive ambiguity" of the 1980 Act and which build interpretive precedent.

First and foremost, however, the question presented by this petition for review is whether the four-member Judicial Council of the Second Circuit will respect its threshold duty to protect the integrity of the process by addressing the issue of the Circuit's disqualification, set forth with specificity in the record before it. This includes the specific disqualification of two of the members of the Judicial Council, by reason of their participation in events forming the background to these complaints -- events alleged by my complaints to establish the Circuit's disqualification for *actual* bias. These two judges are Circuit Judge Guido Calabresi and District Judge Thomas Griesa, Chief Judge of the Southern District (*See* discussion at pp. 5-8, 10).

CHIEF JUDGE WINTER FAILS TO ADJUDICATE THE THRESHOLD ISSUE RAISED BY THE COMPLAINTS OF HIS DISQUALIFICATION FOR BIAS AND SELF-INTEREST -- WHICH ISSUE HE ENTIRELY OMITS FROM HIS DISMISSAL ORDER

The PREFATORY NOTICE to my §372(c) complaints against the three-judge appellate panel asserted in no uncertain terms that Chief Judge Winter was "absolutely disqualified" from reviewing these complaints. Likewise my complaint against the district judge asserted that Chief Judge Winter was "absolutely disqualified" (p. 4, fn. 6).

As *expressly* identified in those complaints, the allegations that the complained-of judges engaged in fraudulent, retaliatory decision-making in *Sassower v. Mangano* mirror similar allegations in my prior §372(c) complaint against then Chief Judge Jon Newman for his fraudulent and retaliatory appellate decision in *Sassower v. Field* -- a decision in which Judge Winter was complicitous as a member of the appellate panel.

Because of the common issues presented by my prior and instant complaints -- each involving bad-faith, egregious judicial decisions, unredressed by the appellate process -- Chief Judge Winter had a self-interest in ensuring that the knee-jerk dismissal of my prior complaint on "merits-related" grounds was not jeopardized. This he could only do by NOT exploring whether, as my instant complaints contended, the Second Circuit's Rule 4(c)(2) mandating dismissal of "merits-related" complaints had to be stricken as violative of the §372(c) statute and in NOT EXPLORING the factors governing the **[p. 3]** appropriate exercise of the statutory discretion *not* to dismiss "merits related" complaints, *inter alia*, the availability and efficacy of judicial/appellate remedies. Sure enough, these issues[2], whose critical significance was detailed in my instant complaints, are wholly omitted from Chief Judge Winter's order. Based on his determination that the complaints are "merits-related", he has dismissed them automatically.

From the record before him, Chief Judge Winter *knew* that unless he summarily dismissed my §372(c) complaints as "merits-related", he would be required to appoint a special committee, for whom it would be a *simple* matter to verify the complained-of bias and corrupt conduct of the appellate panel and the district judge. Annexed to the complaints against the appellate panel (Exhibit "A" thereto) was a line-by-line analysis of its Summary Order and annexed to the complaint against the district judge (Exhibit "A" thereto) was a line-by-line analysis of his Memorandum Opinion. These provided meticulous record references establishing those

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[2] These issues were all previously presented in my May 30, 1996 petition for review of the dismissal of my §372(c) complaint against then Chief Judge Newman -- *without* any responsive adjudication by the Second Circuit Judicial Council. (*See* fn. 4).

documents to be *knowing and deliberate* judicial frauds. Such frauds concealed the true state of the record in *Sassower v. Mangano* -- not only alleged to entitle me to full relief, *as a matter of law*, but so profound in its consequences as to lead to the potential unraveling of the judicial retaliation against me in *Sassower v. Field*. My complaints identified Judge Winter as a key player in that retaliation

Only Chief Judge Winter's self-interest in aborting a successful outcome of *Sassower v. Mangano* accounts for his failure, during the period in which my §372(c) complaints were *pending* before him, to request that a vote be taken on my Petition for Rehearing with Suggestion for Rehearing *In Banc*. The Petition, like these §372(c) complaints, particularized how two levels of the federal judiciary had subverted all adjudicatory standards. Like them, it was buttressed by my incorporated-by-reference fact-specific, fully-documented motion to vacate for fraud the appellate panel's Summary Order and the district judge's Judgment. Based thereon, *any* impartial Chief Judge would have acted to assure rehearing -- particularly if there were a possibility that he would be dismissing my §372(c) complaints as "merits-related". To do otherwise would result in fraudulent on-the-bench conduct by federal judges evading judicial review in the Circuit by way of rehearing *in banc* and §372(c) disciplinary review. Yet, Chief Judge Winter's self-interest required that he deprive me of *both* judicial and disciplinary remedies since either could expose his misconduct in *Sassower v. Field*.

It is to conceal his duplicity in dismissing my complaints as "merits-related" -- after having just allowed my Petition for Rehearing with Suggestion for Rehearing *In Banc* to be denied -- that his dismissal order purposefully omits *any* mention of the saliently-alleged fact that such Petition had even been filed. Likewise, he omits my allegation that *Sassower v. Mangano* is headed for the U.S. Supreme Court and ignores my *express* request that should my appellate panel complaints be dismissed as "merits-related", the dismissal order articulate "that the sole avenue for review of deliberate, on-the-bench misconduct by Circuit judges is in the U.S. Supreme Court...so that the **[p. 4]** Supreme Court can more fully appreciate -- and make appropriate provision for -- its transcendant appellate and supervisory obligation -- without which there is no disciplinary review in the Circuit". (*See* last sentence of appellate panel complaints).

That Chief Judge Winter *also* does not wish *any* review *outside* the judicial branch of my allegations against the complained-against judges may be seen from his failure to follow the Judicial Conference's recommendation that:

> "...if a chief judge or circuit council dismisses, solely for lack of jurisdiction under §372(c), non-frivolous allegations of criminal conduct by a federal judge, the order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing such allegations to the attention of appropriate federal or state criminal authorities" (3/15/94 Report of the Proceedings of the Judicial Conference, p. 30, #11)[3]

At bar, Chief Judge Winter has not dismissed my complaints as "frivolous", but solely on "merits-related" grounds. Indeed, in view of the serious and fully-documented nature of the allegations of my complaint of fraud and criminal conduct by federal judges, subverting all aspects of the judicial/appellate process in *Sassower v. Mangano*, Chief Judge Winter was bound by the same ethical

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[3] The National Commission on Judicial Discipline and Removal's recommendation -- on which the Judicial Conference made its modification -- was as follows:

> "...a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary,...they [should] notify the complainant of the names and addresses of the individuals whose attention the charges might be brought." (Report, at p. 97)

obligations to take "appropriate action" in the face of such misconduct, as was highlighted in my appellate panel complaints (at p. 2): Canon 3B(3) of the Judicial Conference's Code of Judicial Conduct and Canon 3D of the ABA's Code -- which he has wholly flouted.

Under 28 U.S.C. §455(e) and Canon 3D of the Code of Conduct for U.S. Judges and Canon 3F of the ABA Code of Judicial Conduct, a judge is required to, *sua sponte*, disclose facts bearing upon his impartiality. Yet, Chief Judge Winter's dismissal order makes no disclosure based on the facts already in the record before him. Nor does he adjudicate my threshold contention that he is disqualified for bias and self-interest. Instead, he conceals such contention by omitting all references to it from his dismissal order. Chief Judge Winter thereby replicates the *very* judicial misconduct for which I sought §372(c) review: the appellate panel's failure to disclose facts in the record before it **[p. 5]** bearing on its lack of impartiality, and its failure, in its Summary Order, to adjudicate my recusal application against it -- whose very existence it concealed by knowing omission. Indeed, my complaints *expressly* asserted, as a disciplinary principle, that:

> "Where...a recusal application is 'is not frivolous or fanciful, but substantial and formidable', it is misconduct for judges to deny it *without any reasons or findings as to its sufficiency*. It is certainly misconduct *per se* for judges not to confront bias issues squarely before them for adjudication..." (at p. 4, emphasis in the original).

Chief Judge Winter does not deny or dispute such vital disciplinary principle -- which is plainly relevant to his conduct. Rather, he conceals this principle by omitting any mention of it from his dismissal order, together with ALL my complaints' factual allegations pertinent thereto.

That Chief Judge Winter should engage in the very conduct asserted by my §372(c) complaints as "misconduct *per se*" warrants disciplinary action by this Circuit Council. This is consistent with

Canon 3(B)(3) of the Code of Conduct for U.S. Judges and Canon 3(D) of the ABA Code of Judicial Conduct. By such misconduct and his demonstrably dishonest decision, as herein detailed, Chief Judge Winter has acted to obstruct justice -- a criminal and plainly impeachable offense.

CHIEF JUDGE WINTER FAILS TO ADJUDICATE THE THRESHOLD ISSUES RAISED BY THE COMPLAINTS AS TO THE APPEARANCE AND ACTUALITY OF THIS CIRCUIT'S BIAS, AS WELL AS ITS SELF-INTEREST -- WHICH ISSUES HE ENTIRELY OMITS FROM HIS DISMISSAL ORDER

No fair and impartial Judicial Council, worthy of supervisory and disciplinary responsibilities, would allow a judge within its jurisdiction to adjudicate a matter without having first addressed the threshold bias issues raised against him. That Chief Judge Winter has so flagrantly done so suggests that he confidently believes that the Judicial Council will collusively cover up for him -- much as it did for Acting Chief Judge Amalya Kearse after she dismissed my prior §372(c) complaint against then Chief Judge Newman by a dishonest and conclusory order[4]. Indeed, in addition to *not* adjudicating his own **[p. 6]** disqualification for bias and self-interest, Chief Judge Winter's dismissal order does *not* adjudicate my contention that the bias and self-interest of the Circuit require that my §372(c)

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[4] Copies of my petition for review of Acting Chief Judge Kearse's dismissal of my §372(c) complaint against then Chief Judge Newman -- and the Judicial Council's generic affirmance -- were annexed to my incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion to substantiate the *actuality* of this Circuit's bias. By letter dated November 10, 1997, Supervising Administrative Attorney Beth Meador advised me that they had been "removed from the motion", stating "Judicial Misconduct Complaints are confidential and, therefore, cannot be included in papers in the public file". In truth, the §372(c) statute does *not* require the confidentiality of §372(c) complaints -- a fact highlighted by my daughter's article "*Without Merit: The Empty Promise of Judicial Discipline*" [Long Term View, (Massachusetts School of Law Journal), Vol. 4. No. 1], annexed as an exhibit to my instant complaints.

complaints be transferred to a different Circuit. The very contention is likewise omitted from his dismissal order.

As hereinabove stated, the threshold issue of the Circuit's disqualification for bias and self-interest must be determined by the Judicial Council BEFORE any other -- and by a determination which responds to those specifics. To do otherwise would subject the Judicial Council to the same *per se* misconduct charge, asserted in my complaints against the appellate panel.

To date, the Circuit has refused to address its disqualification by *any* reasoned determination. On April 1, 1997, even before the appellate panel was assigned to *Sassower v Mangano*, I made a motion for the Circuit's recusal. That fact-specific motion was denied, *without* reasons, by a Circuit panel presided over by Judge Kearse -- whose disqualification, based on her cover-up of the judicial misconduct in *Sassower v. Field*, was the subject of separate affidavit objection[5]. Sitting with Judge Kearse on the Circuit panel was Judge Calabresi. Thereafter, in my Petition for Rehearing with Suggestion for Rehearing *In Banc* of the appellate panel's Summary order, I substantiated my assertion (at p. 14) of the Circuit's disqualifying *actual* bias by a fact-specific, fully-documented motion for the Circuit's recusal, which I incorporated by reference. The Circuit failed to request a vote on my Suggestion for Rehearing *In Banc* and the appellate panel denied, *without reasons*, my Petition for Rehearing. This followed the appellate panel's denial, *without reasons*, of my aforesaid post-appeal recusal motion. It is that comprehensive, fully-documented motion, dated October 10, 1997, which is *explicitly* referred to in the first sentence of the PREFATORY NOTICE to my appellate panel complaints. Page 1 of those complaints *explicitly* cites the prior April 1, 1997 recusal motion.

My §372(c) complaints themselves summarized the content of those motions, with particulars of both *actual* and apparent bias. As to the appearance of impropriety in this Circuit's adjudication of matters involving me, I included (1) the Circuit's personal and professional relationships with the state judges sued for corruption in *Sassower v. Mangano*; (2) my familial relationship with judicial

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[5] *See* my April 28, 1997 Supplemental Affidavit.

whistle-blower, George Sassower; this Circuit's nemesis' -- as reflected by his lawsuits and complaints against its judges[6]; and (3) my own whistle-blowing public advocacy against this Circuit for retaliating against me because of that familial relationship, including by its dishonest appellate decision in *Sassower v.* **[p. 7]** *Field* (*See*, p. 2 of appellate panel complaints).

As to its *actual* bias, my complaints described this Circuit's complicity in the maligning and fraudulent decision in *Sassower v. Field* by its failure to grant my dispositive Petition for Rehearing with Suggestion for Rehearing *En Banc* therein, as well as Southern District Chief Judge Griesa's suspension of my law license in violation of the Southern District's own Rule 4 and my constitutional rights[7]. My complaints *expressly* asserted that by such actions, the Circuit had demonstrated its retaliatory self-interest in depriving me of my good name, financial well-being, and law license -- all of which were at issue in *Sassower v. Mangano* and which would necessarily be restored if the case were decided on the facts and law. Indeed, the $100,000 that the Circuit had judicially robbed from me in *Sassower v. Field*, by its *sua sponte* invocation of "inherent power", was a proverbial "drop in the bucket" compared to the millions of dollars to which I am entitled in compensatory and punitive damages from the *Sassower v. Mangano* defendants (*See* p. 3 of appellate panel complaints).

My complaints further noted that this Circuit's self-interest in *Sassower v. Mangano* also derived from the fact that Mr. Sassower would directly benefit from a declaration that New York's attorney disciplinary law is unconstitutional and has been misused by the state judicial defendants to retaliate against me -- since he had long contended in his lawsuits and judicial misconduct complaints that his

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[6] *See, inter alia, In re George Sassower*, 20 F3d 42 (2nd Cir. 1994) -- a decision alleged (at p. 1) in my May 30, 1996 petition for review of my prior complaint against then Chief Judge Newman -- to be "the only 'precedential' published decision of this Circuit relating to §372(c) complaints in the 16 years since the statute was enacted by Congress". I believe such remains true today.

[7] *See* p. 2 of complaint against the district judge.

state disbarment was a judicial fraud. Moreover, as my Petition for Rehearing with Suggestion for Rehearing *In Banc* pointed out (at pp. 13-14), verification of my claims that two levels of the federal judiciary had, by fraudulent decisions in *Sassower v. Mangano*, covered up corruption in the New York State courts in which the State Attorney General was a collusive, active participant would lend powerful support to Mr. Sassower's claims that dishonest decisions were the means by which the federal judiciary -- and particularly this Circuit -- had been disposing of his cases raising similar issues of state court corruption, aided and abetted by the State Attorney General (*See* pp. 3-4 of appellate panel complaints).

No unbiased Circuit could ignore the transcendant issues I raised as to the corruption of the judicial process in my Petition for Rehearing with Suggestion for Rehearing *In Banc* and its incorporated-by-reference October 10, 1997 recusal/vacatur for fraud motion. The fact that not a single one of its judges requested a vote on the *In Banc* suggestion demonstrates, *prima facie*, the Circuit's bias. It also supports the view that the Circuit has a self-interest in not exposing the heinous judicial misconduct chronicled therein because, as alleged, it was committed in furtherance of Circuit objectives (*See* p. 2 complaint against the district judge).

By denying *In Banc* review, this Circuit has put its imprimatur on a Summary Order appellate "affirmance" of a district judge's "Judgment" -- both demonstrated to be fraudulent by my Petition for Rehearing. This includes Judge Calabresi and Judge Joseph McLaughlin, who having declined to request a vote on the Suggestion for Rehearing *In Banc*, became complicitous in the fraudulent judicial documents on which these §372(c) complaints rest (*See* fn. 17, quoting *Green v. Seymour*, **[p. 8]** 59 F.3d 1073, 1077 (10th Cir. 1995)). Unless they "dump" these complaints, their role in subverting my judicial/appellate remedies in *Sassower v. Mangano* will be exposed. Indeed, were the Council to consider these complaints as "merits-related", which they are not, their cognizability under the §372(c) statute would require it to examine the available judicial/appellate processes, alleged by the complaints to have been corrupted by the Circuit's bias and self-interest. The consequence is that Judges Calabresi and McLaughlin's evaluation of the cognizability of these complaints will rest on their judging their own conduct.

CHIEF JUDGE WINTER'S DISMISSAL ORDER IS BASED ON OMISSION OF THE MATERIAL ALLEGATIONS OF THE COMPLAINTS -- WHOSE LEGAL SIGNIFICANCE IS DISPOSITIVE OF THE COGNIZABILITY OF THESE §372(c) COMPLAINTS

Having ignored, *without* adjudication, the threshold disqualification issues relating to himself and the Circuit, Chief Judge Winter has further actualized his bias by the very misconduct as was alleged by my §372(c) complaints to demonstrate, *prima facie*, the *actual* bias of the district judge and appellate panel. Like those judges, whose decisions in *Sassower v. Mangano* were alleged to have purposefully obliterated the pivotal allegations of my Verified Complaint that made it invulnerable to pleading defenses, Chief Judge Winter has followed a similar *modus operandi*. His dismissal order purposefully obliterates the pivotal allegations of my §372(c) complaints which -- were they identified -- would have prevented him from dumping the complaints as "merits-related". And just as the complained-against judges falsified the evidentiary record, so Chief Judge Winter substitutes exculpatory speculation for transcript evidence as to the single allegation which, *without* explanation, he has deemed within the purview of disciplinary examination.

Among the critical allegations of my complaints obliterated by Chief Judge Winter's dismissal order are those pertaining to the general principles to be applied for the "initial review" phase of §372(c) complaints relative to the statutory ground of dismissal, "directly related to the merits of a decision or procedural ruling":

(1) that complaints alleging bad-faith, biased conduct, which is egregious, are not "merits-related";

(2) that even "merits-related" complaints are *not* required to be dismissed under the statute;

(3) that the Circuit's Rule 4(c)(2) requiring dismissal of "merits-related" complaints must be stricken as violative of the statute;

(4) that the unavailability or ineffectiveness of

judicial/appellate remedies are proper factors for the statutory discretion to review "merits-related" **[p. 9]** complaints; and

(5) that the discretion to review "merits-related" complaints is properly exercised where the criteria set forth in the Commentary to Canon 1 of the Code of Conduct of U.S. judges have been met.

Likewise obliterated from his order is my assertion that the Judicial Conference and National Commission on Judicial Discipline and Removal had long ago recognized the need to resolve the "substantive ambiguity" of the 1980 Act by interpretive precedent and that my complaints were suitable for interpretive determinations.

In dismissing my complaints as "directly related to the merits", which he does pursuant to both 28 U.S.C. §372(c)(3)(A)(ii) **AND** the Second Circuit Judicial Council's Rule 4(c)(2), Chief Judge Winter simply ignores that the statute -- unlike the rule -- does *not* require dismissal of "merits-related" complaints. And by obliterating from his dismissal order virtually all the judicial/appellate odyssey that is part of my complaints, he demonstrates the correctness of my contention that the discretion afforded by the statute not to dismiss "merits-related" complaints is:

> "...particularly warranted where judicial and appellate remedies are unavailable -- or, as at bar, unavailing by reason of the protectionism and self-interest complained of." (p. 4 of complaint against the district judge)

It is to set the stage for his "merits-related" dismissal that his skimpy five-sentence "Background" section (at pp. 1-2) goes from a description of my §1983 action, to the district judge's summary dismissal, to the Second Circuit's affirmance. He thereby seeks to create the illusion that the Second Circuit affirmed the issue presented by my appeal: the dismissal of my action, with the story ending there. This is untrue -- and highlighted by the very paragraphs of the complaint that immediately proceed the above quote.

On appeal to the Second Circuit, the SOLE transcending issue

presented by my brief was the district judge's pervasive bias, as manifested by his egregious rulings on the motion submissions before him and by his failure to rule on my uncontroverted, fully-documented sanctions applications against defendants for their litigation fraud. Yet, the appellate panel failed to adjudicate or even address the issue of the district judge's bias and *expressly* did *not* adjudicate the propriety of his rulings (or non-rulings) on the motion submissions before him. Nor did the appellate panel adjudicate or address the issue of its own bias -- raised at oral argument. My complaints highlighted these facts, presenting a record showing a combined total of eight bias/recusal applications in the *Sassower v. Mangano* litigation, as well as a shocking array of *unadjudicated* sanctions applications against defendants for their litigation fraud -- all uncontroverted and fully-documented. This was not only essential "Background" to these complaints, but had the extraordinary facts as to the disposition of those recusal and sanctions applications been presented, it would have sufficed to establish the basis for my allegations of a pattern of wilful cover-up and conspiracy by judges of this Circuit and the Southern **[p. 10]** District.

Thus, while my §1983 federal action was before the district judge, I made repeated applications to him for sanctions against defendants for their litigation fraud. The district judge *failed to adjudicate* any of these sanction applications, notwithstanding they were fully-documented and uncontroverted. I also made a motion for the district judge's recusal pursuant to 28 U.S.C. §144 and §455 [R-643-733] (#1), which he denied from the bench [R-762-765], thereafter denying my motion for reargument, renewal, and reconsideration [R-743-864] (#2) as part of his Opinion dismissing the case [R-14]. It was while that reargument motion was pending that I turned to the district judge's superior, Southern District Chief Judge Griesa, to exercise his "supervisory power over [the] district judge whose manifest bias ha[d] caused him to run amok" (Br. 3) [3/8/96 ltr: R-901]. Chief Judge Griesa's failure to respond resulted in my requesting his recusal on specified conflict of interest grounds -- to which he also *failed to respond* [5/3/96 ltr: R-903-907] (#3).

On appeal, the overarching issue of the district judge's bias was particularized as including his wrongful denial of my recusal and reargument (Br. 31-37) motions and his failure to adjudicate the fraud/sanctions applications against defendants (Br. 38-50). *Prior* to

designation of the appellate panel, I filed a motion for the Circuit's recusal and transfer to another Circuit[8], to which was joined a fully-documented sanctions motion against the defendants for their fraudulent conduct in the case management phase of the appeal (#4). This was denied, *without* reasons, by a three-judge panel which included Judge Calabresi and, as presiding judge, Judge Kearse, against whom I had filed an affidavit objection based on her disqualifying *actual* bias[9] (#5). Thereafter, I reiterated that recusal motion at oral argument of the appeal (#6), but was cut-off, mid-sentence, *without* any ruling on it by the appellate panel, which also failed to disclose facts bearing on the appearance of its lack of impartiality[10].

Following the appellate panel's Summary Order -- which did *not* adjudicate the issue of the district judge's bias, including his denial of recusal and reargument thereof and his failure to rule on the sanctions applications against defendants, nor adjudicate its own bias or my application for sanctions against defendants for their fraudulent opposing brief -- I encompassed a request for the Circuit's recusal in a Petition for Rehearing with Suggestion for Rehearing *In Banc* (at pp. 14-15) (#7). The SOLE transcending issue raised by that Petition was the "integrity of the judicial process".

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[8] *See* my April 1, 1997 recusal/sanctions motion [Appellate Case Management Phase].

[9] *See* my April 28, 1997 Supplemental Affidavit and the one-word denial Order, dated April 29, 1997, of Judges Kearse, Calabresi, and Oberdorfer [Appellate Case Management Phase].

[10] *See* transcript of the August 27, 1997 oral argument, pp. 9-10 [annexed as Exhibit "K" to my October 10, 1997 recusal/vacatur for fraud motion [Post-Appeal Proceedings].

[p. 11] Incorporated therein by reference was my separately-filed motion for recusal of the appellate panel and Circuit, pursuant to 28 U.S.C. §455 (#8), to which was joined a fully-documented motion to vacate for fraud the appellate panel's Summary Order and the district judge's judgment. *Without reasons*, the appellate panel denied that post-appeal recusal/vacatur for fraud motion[11]. Likewise, *without reasons*, it denied the Petition for Rehearing *In Banc* and, together with the Circuit judges, failed to request a vote on the Petition's Suggestion for Rehearing *In Banc*[12].

ALL of the foregoing -- with the exception of appellate panel and Circuit disposition of my Petition for Rehearing with Suggestion for Rehearing *In Banc*, then *sub judice* -- were either *expressly* alleged by my complaints as pivotally significant or readily-discernible from the record. Yet, they are not only completely omitted from the "Background" section of Chief Judge Winter's dismissal order, but almost as completely omitted from the seven-sentence "Allegations" section (pp. 2-3).

Thus, although the order's three-sentence description of my complaint against the district judge (p. 2) identifies that I alleged that he "wilfully fail[ed] to adjudicate [my] applications for sanctions", that "pervasive bias" and "flagrant dishonesty" accounted for his denial of my recusal and reargument motions"[13], and that he "violated canons of judicial ethics by failing 'to take corrective steps in the face of misconduct' by the judges and attorneys who are the defendants...", Chief Judge Winter fails to identify what my complaint alleged had happened to ALL these issues on appeal, to wit, they were ALL ignored, *without* adjudication, by the appellate panel.

Nor does his four-sentence description of the allegations of my complaints against the appellate panel (pp. 2-3) contain *any*

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[11] *See* one-word denial Order, dated October 22, 1997, of the appellate panel [Post-Appeal Proceedings].

[12] *See* Order dated December 17, 1997 [Post-Appeal Proceedings].

[13] Chief Judge Winter misrepresents the motion to reargue the district judge's denial of my recusal motion as a "motion to reargue the dismissal" (at p. 2).

equivalent mention of my motions for *its* recusal or *its* wilful failure to adjudicate my sanctions applications against defendants for their fraudulent defense of the appeal. And it misrepresents my allegations of the appellate panel's "violations of canons of judicial ethics" as being based on its "failure to take action against the judicial officers named as defendants in the underlying action". In fact, it was based on the panel's failure to take action against the district judge and defendant state officials colluding in fraud and against the co-defendant state Attorney General, whose fraud continued on through the appeal (*See* pp. 1-2 complaints against appellate panel)..

Indeed, Chief Judge Winter goes out of his way to conceal that recusal/vacatur for fraud motions had been made against the appellate panel. Thus, in the first sentence of the four-sentence description of my appellate panel complaints, he states (p. 2), "Complainant seeks to incorporate by reference hundreds of pages of material from the underlying suit". Chief Judge Winter avoids *any* identification **[p.** 12] of what the essence of that material is -- material *expressly* identified by my complaints to include my October 10, 1997 recusal/vacatur for fraud motion[14]. Similarly, in the third sentence, he acknowledges that I alleged that "Judge C[15] 'cut [Complainant] off, mid-sentence' at oral argument", but conceals that it was during my oral recusal application that I was cut off. This was *expressly* alleged by the very first paragraph of my appellate panel complaints. As to this specific allegation of being "cut off", the "Disposition" section of the dismissal order continues the concealment:

> "The allegations of misconduct in these complaints are rooted in judicial rulings. Apart from one assertion that Judge C cut off Complainant at oral argument -- an act that is often required to curtail loquacity and that, **without more**, does not constitute judicial

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[14] *See* first sentence of my PREFATORY NOTICE to my appellate panel complaints, as well as the second paragraph of page 4 thereof.

[15] Presiding Judge Jacobs is "Judge B" -- not Judge "C".

> misconduct -- the alleged infirmities of the rulings are the only 'evidence' cited in support of the sweeping charges." (at p. 3, emphasis added)

Chief Judge Winter omits that there is "**more**" to my assertion of having been "cut off" -- and that it is not only alleged by my complaints but documentarily established by the transcript of the oral argument, which my complaints *expressly* identified[16] as annexed to my October 10, 1997 recusal/vacatur for fraud motion and analyzed in 17 pages of my 43-page affidavit supporting that motion. That Chief Judge Winter knows that his speculation as to "loquacity" is bogus may be inferred from the fact that he does *not* refer to the transcript to establish its relevance. This contrasts sharply with what appears to be his general practice of examining transcripts in other judicial misconduct complaints. Thus, he examined the transcripts for the following §372(c) complaints, filed both before and after my own: (a) *In re Charge of Judicial Misconduct*, #97-8524, filed on July 22, 1997 and dismissed on September 11, 1997; (b) *In re Charge of Judicial Misconduct*, # 97-8534, filed on October 14, 1997 and dismissed on January 20, 1997; and (c) *In re Charge of Judicial Misconduct*, # 98-8505, filed on January 16, 1998 and dismissed on March 4, 1998. Two of these complaints were before Chief Judge Winter during the same period as my own.

The inference of Chief Judge Winter's above-quoted assertion in his "Disposition" section that my allegations of judicial misconduct are "rooted in judicial rulings" and his quote from *In re Charge of Judicial Misconduct*, 685 F.2d 1226, 1227 (9th Cir. Jud. Counc. 1982) that

> "To determine whether a judge's rulings were so legally indefensible as to mandate intervention would require the same type of legal analysis as is afforded on appeal."

is that appeal would afford such analysis. Yet, conspicuously his

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[16] *See* appellate panel complaints, p. 4, para 2.

dismissal order says nothing about **[p. 13]** whether the appellate panel had afforded *any* "type of legal analysis" on my appeal of the district judge's rulings. Indeed, from the innumerable allegations of my complaints -- ALL omitted by Chief Judge Winter -- he knew it had not. Nor does his dismissal order acknowledge my further allegation that the *only* appellate review available from the appellate panel's Summary Order, aside from my Petition for Rehearing with Suggestion for Rehearing *In Banc*, is in the United States Supreme Court, a statistical unlikelihood (*See* p. 5, appellate panel complaints).

Chief Judge Winter's failure to comment upon the integrity and efficacy of the Second Circuit appellate process in *Sassower v. Mangano* -- impugned by my complaints -- or to illuminate the subject of venue within the federal judiciary for review of the serious misconduct alleged by my complaints is in the face of my *explicit* allegations that a non-conclusory order would require fact-specific exposition (*See* p. 5, appellate panel complaints).

The complete exhaustion and ineffectiveness of judicial/appellate remedies within the Circuit, alleged by my complaints, stands in marked contrast to the situation in *In re Charge of Judicial Misconduct*, *supra*, 1227. There, the Ninth Circuit's Chief Judge based his dismissal of the complaint on his "analysis" that "each of the rulings or failures to rule could have been appealed to the district court or the court of appeals" -- an "analysis" with which that Circuit's Judicial Council agrees. The inference is the complained of rulings and failures to rule were not appealed. What could be more inapposite than that case to the case at bar!

In truth, the ONLY relevance of *In re Charge of Judicial Misconduct*, *supra*[17] -- is for the **[p. 14]** proposition for which I

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[17] The ONLY seeming relevance of Chief Judge Winter's citation to *Green v. Seymour*, 59 F.3d 1073, 1077-78 (10th Cir. 1995) -- which is *not* a decision involving a §372(c) complaint -- is to add a superfluous citation. Its inclusion underscores precisely what was summarized in the article, "*Without Merit: The Empty Promise of Judicial Discipline*", annexed to my complaints: that there is little caselaw on §372(c) because the federal judiciary has not generated precedential decisions in a deliberate effort to keep the "merits-related" category undefined so as to dump virtually every §372(c) complaint it receives on that ground. Chief Judge Winter's conclusory and unpublished dismissal order herein reinforces that point -- as

myself cited it in my complaint against the district judge:

> "We need not reject the possibility of an exceptional case developing where the nature and extent of the legal errors are *so egregious* that an inference of judicial misconduct might arise, but that would be a rare case, and it has not occurred here. We note, moreover, that there is neither an assertion or evidence that the judge acted with *improper motive*." (*See* p. 5 of my complaint against the district judge, emphasis added).

Chief Judge Winter's "Disposition" section does not deny or dispute the validity of these principles or that, as alleged by my complaint against the district judge (at p. 5), this is the "rare case". Moreover, it acknowledges that my §372(c) complaints alleged egregious conduct and improper motive, stating:

> "Complainant's argument is that Judge A's rulings, and the affirmance by Judges B, C, and D, were *so egregiously wrong* that they could have only resulted from *bias and deliberate wrongdoing*." (at p. 4, emphasis

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do the Circuit's other conclusory and unpublished dismissal orders, on file in a binder in the Clerk's Office. This includes the Judicial Council's Memorandum and Order in its most recent investigation of a §372(c) complaint, #96-8523. All fail to explore the "merit-related" category and make dismissal on that ground automatic.

It may be noted that *Greene v. Seymour*, *supra*, is, in other respects, extremely relevant to my complaint, including by its statement:

> "Except for cases involving fraud on the court, we know of no basis upon which a decision of a court of appeals, valid on its face, and the denial of rehearing en banc of that decision, may be challenged as the product of a conspiracy among the judges to deny the losing litigant his rights."

added)

and further that my complaints had contended that the complained-of judges had "*intentionally* omitted and misrepresented" facts in their rulings (at p. 5, emphasis added). Turning back to the "Allegations" section (pp. 2-3), the dismissal order quotes from my complaint that the district judge had issued a "*knowingly* false, fabricated, and fraudulent decision of dismissal" and had "*wilfully* fail[ed] to adjudicate" my sanctions applications and that the appellate panel had issued a "*knowingly* false and fraudulent not-for-publication, no-citation Summary Order" (emphases added). As to the improper motive, the "Allegations" section -- although conspicuously omitting the protectionism of the state judicial defendants alleged, with particularity, in my complaint against the district judge -- and expunging that all-important improper motive from its recitation of my complaints against the appellate panel, nonetheless identified one illicit motive as having been alleged, "to retaliate for the 'judicial whistle-blowing advocacy' of Complainant and others in her family" (at p. 3).

Yet, contrary to *In Re Judicial* Misconduct, *supra*, where the Ninth Circuit Judicial Council determined that the judges' complained-of rulings did not reach a level of "egregiousness" and that there was neither an assertion nor evidence of "improper motive", Chief Judge Winter makes no findings as to "egregiousness" or "improper motive". Instead, he rejects my complaints as not being cognizable under §372(c) with the bald claim:

> "...all of the alleged misconduct -- including the claims that facts were intentionally omitted and misrepresented and that the Judges did not comply with canons of judicial ethics -- is intertwined with the substance of those rulings." (at p. 5)

[p. 15] *No* legal authority is supplied for this proposition -- which is contrary to *In re Charge of Judicial Misconduct*, *supra*. Indeed, in order to advance such false claim, Chief Judge Winter then "shifts gears" and -- in the end of his "Disposition" section (at p. 5) -- leaps to the pretense that my §372(c) complaints are about good-faith

conduct, in other words, "simply objections to substantive or procedural error", for which he includes the irrelevant continuation of the quote from *In re Charge of Judicial Misconduct*, *supra*:

> "More important, the gravamen of the complaint is not the fitness of the judge, but the merit of his decision. Disciplinary procedures must not be used to correct judicial mistakes."

Yet, not only did my complaints *expressly* emphasize that they were not about good faith judicial "error", but Chief Judge Winter's own descriptions of them -- including his above-cited quotes -- make manifest that they *are* about the fitness of the complained-of judges, being grounded in allegations of their bad-faith, knowingly corrupt judicial conduct. This would have been even more evident had Chief Judge Winter not expurgated the most relevant particulars of my complaints, including my extensive presentation of the illicit motive for the misconduct. As reflected by the article, "*Without Merit: The Empty Promise of Judicial Discipline*", annexed to my complaints, allegations of biased, bad-faith conduct are not "merits-related" and are reviewable *irrespective* of whether there is an appellate remedy[18].

CONCLUSION

My PREFATORY NOTICE gave counsel ignored by Chief Judge Winter. It is applicable to the Judicial Council on this petition for review:

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[18] *See*also p. 2 of my prior May 30, 1996 petition for review, citing *In re Charge of Judicial Misconduct*, 593 F.2d 881 (1979) as enunciating the governing standard for disciplinary review: to wit, whether the complaint presents:

> "...any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office."

> "Under 28 U.S.C. §1254(2), the Circuits may certify questions to the U.S. Supreme Court as to which they desire instruction. Should there be any question as to this Circuit's duty to transfer [these] fully-documented complaint[s] and the federal judiciary's supervisory and ethical obligation to investigate [them], it should be certified to the U.S. Supreme Court, in conjunction with my intended petition for a writ of certiorari, and sent, as well, to the Judicial Conference for an advisory opinion, *inter alia*, to its Committee on Codes of Conduct and its Committee to Review Circuit Council Conduct and Disability Orders."

[p. 16] Under §372(c)(7)(A), the Judicial Council "may, in its discretion, refer any complaint" to the Judicial Conference. A referral is mandated under §372(c)(7)(B), where the Council determines "that a judge appointed to hold office during good behavior" may have engaged in conduct which is impeachable or which, "in the interest of justice, is not amenable to resolution by the judicial council".[19] Such circumstances are presented by my instant complaints, setting forth conduct by four federal judges, which is, and was alleged to be, impeachable -- and which this Circuit's Chief judge has sought to cover up by a dishonest dismissal, itself impeachable conduct.

Indeed, disciplinary action must also be taken against Chief Judge Winter, pursuant to Canon 3(B)(3) of the Code of Conduct for U.S. Judges, Canon 3(D) of the ABA Code of Judicial Conduct and §372(c)(7)(B) for his flagrant subversion of the §372(c) remedy, as herein particularized.

So that this Judicial Council may be fully knowledgeable of the extent to which its actions will be affording Congress a "front-seat" view of the federal judiciary's commitment to "self-policing",

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[19] Referrals under §372(c)(7)(A) *expressly* do not require a report from a special committee after investigation and under §372(c)(7)(B) may be based on "information otherwise available to the council".

I am annexing copies of the Center for Judicial Accountability's March 10, 1998 and March 23, 1998 Memoranda to the House Judiciary Committee as Exhibits "A" and "B". As reflected by the March 23rd Memorandum, the record of these §372(c) complaints, including the appellate file in *Sassower v. Mangano*, has been forwarded to the Committee. This should go far in enabling Congress to undertake -- finally -- the "vigorous oversight" it promised when it passed the 1980 Act.

DORIS L. SASSOWER

cc: New York State Attorney General Dennis Vacco
House Judiciary Committee
Judicial Conference of the United States
c/o Administrative Office of the United States Courts
Jerome Shestack, President, American Bar Association

EXHIBIT "A" TO PETITIONER'S PETITION FOR REVIEW TO THE SECOND CIRCUIT JUDICIAL COUNCIL

MEMORANDUM

TO: HOUSE JUDICIARY COMMITTEE CHAIRMAN HENRY J. HYDE AND HOUSE JUDICIARY COMMITTEE MEMBERS

FROM: ELENA RUTH SASSOWER, COORDINATOR CENTER FOR JUDICIAL ACCOUNTABILITY, INC.

RE: H.R. 1252 (JUDICIAL REFORM ACT OF 1997)

DATE: MARCH 10, 1998

This Memorandum responds to the letter of the Judicial Conference of the United States, dated March 3, 1998, addressed to Chairman Hyde, with copies to each of the members of the House Judiciary Committee. By that letter, the Judicial Conference expresses its opposition to the first eight sections of H.R. 1252 (except Section 1, its title, "Judicial Reform Act of 1997") and, specifically, Sections 4 and 6, which it characterizes as "particularly significant and highly objectionable". Section 4 would amend 28 U.S.C. §372(c) so that all judicial misconduct complaints, which are not dismissed on statutory grounds, would be referred to another Circuit for investigation. Section 6 provides civil litigants with the opportunity to peremptorily disqualify the federal judge assigned to the case.

The Center for Judicial Accountability, Inc. (CJA) is a national, non-partisan, non-profit citizens organization whose purpose is to safeguard the public interest in meaningful and effective processes of judicial selection and discipline. CJA does this by gathering and analyzing empirical evidence about how these processes -- which are generally shrouded in secrecy -- *actually* work, or don't work.

Where the evidence shows dysfunction and corruption, we provide that evidence to those in leadership positions so that they can *independently* verify it and take appropriate remedial steps.

The Judicial Conference's opposition to Section 4 rests on its claim as to the adequacy of the current 28 U.S.C. §372(c) -- which it represents as an "effective disciplinary process" that is operating "as the [House Judiciary] Committee intended". Its opposition to Section 6 rests on its claim as to adequacy of 28 U.S.C. §144 and §455 -- the statutes relating to the disqualification of federal judges. Such claims are not only resoundingly refuted by evidentiary proof that the federal judiciary has converted §372(c), §144, and §455 to empty shells, but by proof which CJA long ago transmitted to the Administrative Office of the United States Courts for presentment to the appropriate committees of the Judicial Conference so that they could take action to "keep the judiciary's house in order", thereby obviating the need for congressional action. This proof included copies of detailed and fully-documented §372(c) complaints, dumped by demonstrably *dishonest* dismissal orders of Chief and Acting Chief Judges, as well as a rubber-stamp Judicial Council affirmance, and copies of fact-specific, documented motions for recusal, pursuant to §144 and §455, denied for demonstrably *dishonest* reasons by a District judge or denied, without *any* reasons by Circuit judges, making a travesty and charade of any appellate process.

It would appear that the House Judiciary Committee has already succumbed to the Judicial Conference's false claims regarding §372(c) by substantially modifying Section 4 from the way it appeared in the bill which was the subject of the May 14, 1997 hearing, at which the Judicial Conference made similar false claims. The original Section 4 required the transfer of *every* complaint at the outset so that the Chief Judge undertaking the initial review was from a different Circuit than that in which the complained-of judge served. The revised Section 4 allows the Chief Judge of the Circuit in which the complained-of judge serves to undertake the initial review, requiring transfer to another Circuit only for the subsequent investigative proceedings. The catch, of course, is that complaints which are dismissed by Chief Judges are not transferred -- which is virtually ALL complaints. Using the statistics from the 1993 Report

of the National Commission on Judicial Discipline and Removal, out of 2,405 complaints filed under §372(c), only 40 special committees were appointed. Indeed, this revised Section 4 would not even affect the disposition of the complaints from the Sixth Circuit which, according to the Judicial Conference's March 3rd letter, were the impetus for (the original) Section 4, since they were dismissed by that Circuit's Chief Judge -- a dismissal thereafter affirmed by its Judicial Council. The Judicial Conference's letter fails to point this out.

Consequently, it is unclear what the purpose of revised Section 4 is -- except that it may be to alleviate discomfort that the outcome of the aforesaid 40 special committees was so meager. As reported by the key underlying consultants' study to the National Commission's Report, "[t]wenty-seven of these special committee proceedings resulted in eventual judicial council dismissal of the complaint." (Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, p. 575).

From such statistics may be gleaned the fact that serious misconduct is *not* the subject of special committee investigations. Indeed, it might be inferred that a not insubstantial percentage of these committee investigations are diversionary attempts by Chief Judges to make it appear that §372(c) is a functioning mechanism so as to provide a "cover" for their improper and dishonest dismissals of complaints of hard-core misconduct and corruption -- with the rubber-stamp affirmance of Judicial Councils.

That §372(c) is *not* a properly functioning mechanism -- and that this was covered-up by the National Commission on Judicial Discipline and Removal in its methodologically-flawed and dishonest 1993 Report -- are detailed in CJA's published article, "*Without Merit: The Empty Promise of Judicial Discipline*", which appeared last year in the Massachusetts School of Law journal, Long Term View. A copy is annexed so that you can understand the hoax practiced on this Committee and the American people by the Judicial Conference. We, respectfully, ask that the House Judiciary Committee request the Judicial Conference to respond to the serious allegations set forth in that article, specifically as to the National Commission's methodologically-flawed and dishonest review of §372(c), and to also

invite a response from Stephen Burbank, a member of the National Commission, who gave testimony at the May 14, 1997 hearing, which was varyingly false, misleading, and uninformed.

As reflected by that published article, based upon the empirical evidence CJA has been amassing about the federal judiciary's wilful corruption of §372(c), the federal recusal statutes, and its non-enforcement of fundamental ethical codes, including its own, CJA is preparing a formal presentation to the House Judiciary Committee to remove judicial disciplinary jurisdiction from the federal judiciary. Such preparation has been delayed only because we are presently working on a petition for review to a Judicial Council of a Chief Judge's fraudulent dismissal of four §372(c) complaints as "merits-related" -- where the issue presented was the refusal of District and Circuit judges to respect their obligations under the recusal statutes and ethical rules -- as well as working on a petition for a writ of certiorari to the U.S. Supreme Court -- where the issue presented is the federal judiciary's subversion of appellate and disciplinary remedies to address flagrant bias and fraudulent conduct by federal judges, who wrongfully refused to recuse themselves on formal motion. It is a cert petition which demonstrates that Professor Burbank was far too sanguine in his assessment of *Liteky*[1] -- a case simply ignored by federal judges intent on actualizing their bias by the most heinous corruption imaginable.

In the meantime, we respectfully suggest that if this Committee's aim in proposing its original Section 4 was to increase public confidence in the fairness and impartiality of the §372(c) mechanism, public confidence would better be restored by amending §372(c) so as to make EXPLICIT that complaints filed thereunder are accessible to scrutiny by Congress and the public. As pointed out by our published article, the §372(c) statute does NOT require that complaints be confidential. However, following enactment of §372(c), the federal judiciary used its rule-making authority to envelope them in confidentiality and to make them completely inaccessible. This has

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[1] *See* May 14, 1997 hearing transcript, p. 65; [*Liteky v. U.S.*, 114 S.Ct. 1147 (1994)].

enabled the federal judiciary to make all sorts of self-serving claims, such as those advanced in its March 3rd letter and at the May 14, 1997 hearing.

Finally, as to the Judicial Conference's opposition to Section 6 of H.R. 1252, based on §144 and §455, there is a wealth of scholarly material documenting that those recusal statutes have been gutted by the federal judiciary. This includes the consultant's study of Professor Charles Gardiner Geyh for the National Commission on Judicial Discipline and Removal -- which states:

> "While the text of sections 144 and 455 appear to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court refusal to recuse, is rarer still." (Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, p. 771)

Yet, such important information -- which would have alerted Congress to the need to reinforce and clarify the recusal statutes -- appears *nowhere* in the National Commission's Report itself. Indeed, we brought this to the attention of the Administrative Office, together with our empirical demonstration of the federal judiciary's flagrant disregard of any semblance of respect for these statutes.

In view of the fact that the Judicial Conference's March 3rd letter has singled out Sections 4 and 6 as "highly objectionable" -- and the likelihood that these sections will face substantial opposition in the House and Senate as a result -- CJA believes it would be prudent that before H.R. 1252 is voted out of the House Judiciary Committee that the Committee receive information that would be more conclusive and dispositive of what the federal judiciary is *actually* doing with §372(c), §144, and §455. Congress needs to know the extent to which the Judicial Conference -- a taxpayer-supported lobby for the federal judiciary -- has, by fraud and deceit, "pulled the wool over its eyes". Moreover, it is quite obvious from the transcript of the May 14, 1997 hearing on the "Judicial Reform Act of 1997" and the

transcript of the following day's hearing on "Judicial Misconduct and Discipline", that the Committee was groping for specific information, hard answers, and clear evidence -- most of which the panelists dodged or were unable to provide.

CJA will promptly forward to the House Judiciary Committee the same evidentiary proof of the federal judiciary's subversion of §372(c), §144, and §455 that we long ago transmitted to the Administrative Office under coverletters that called for action and response by the Judicial Conference. Such evidentiary materials will not only compel you to substantially revise those sections, but to substantially revise your relationship with the costly-superstructure of the federal judiciary.

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

cc: Judicial Conference of the United States
c/o Administrative Office of the United States Courts
Professor Stephen B. Burbank

EXHIBIT "B" TO PETITIONER'S PETITION FOR REVIEW TO THE SECOND CIRCUIT JUDICIAL COUNCIL

MEMORANDUM

TO: HOUSE JUDICIARY COMMITTEE CHAIRMAN HENRY J. HYDE AND HOUSE JUDICIARY COMMITTEE MEMBERS

FROM: ELENA RUTH SASSOWER, COORDINATOR CENTER FOR JUDICIAL ACCOUNTABILITY, INC.

RE: H.R. 1252 (JUDICIAL REFORM ACT OF 1997)

DATE: MARCH 23, 1998

This Memorandum follows up and reinforces the serious charges made in our March 10, 1998 Memorandum: that the Judicial Conference's opposition to Section 4 and 6 of H.R. 1252 rests on knowing deceit as to the adequacy of 28 U.S.C. §372(c), §144, and §455 and that Professor Stephen Burbank's testimony before this Committee at its May 14, 1997 hearing on H.R. 1252 was "varyingly false, misleading, and uninformed" as to those key sections

The final paragraph of our March 10th Memorandum stated that we would promptly forward to the House Judiciary Committee copies of the evidentiary proof which we had long ago provided to the Administrative Office of the United States Courts -- proof that §372(c), §144, and §455 are "empty shells", which we had requested be presented to the appropriate committees of the Judicial Conference for action. On March 18th, with the enormous job of duplication completed, CJA transmitted to the Republican Majority and the Democratic Minority separate copies of the file of our 2-1/2 year correspondence with the Administrative Office, spanning from

July 20, 1995 to March 10, 1998 -- the date of CJA's Memorandum. Such transmittal, by priority mail, should have already arrived.

We had planned to send Professor Stephen Burbank an *identical* file so that he could re-evaluate his May 14th testimony based on the evidentiary materials to which our Memorandum referred. This included his articulated view that the U.S. Supreme Court's decision in *U.S. v. Liteky*, 510 U.S. 540, 114 S.Ct. 1147 (1994), resolved concerns about the recusal statutes (5/14/97 Tr. 60, 65). However, Professor Burbank's response to our March 13th letter (Exhibit "A") requesting that he inform us if he did not wish to receive those materials was to do just that. By e-mail message, he notified us that he not only did not wish to receive them, but had no intention to review them (Exhibit "B"). As pointed out in our March 16th fax to the House Judiciary Committee, with a copy to Professor Burbank (Exhibit "C"), Professor Burbank's refusal to examine these primary source materials does *not* thereby relieve him of his obligation -- as a former member of the National Commission on Judicial Discipline and Removal -- to refute, *if he can*, our critique of the National Commission's methodology as "flawed and dishonest" and our analysis of §372(c) and the issue of "merits-relatedness", as set forth in "*Without Merit: The Empty Promise of Judicial Discipline*" [Long Term View (Massachusetts School of Law), Vol. 4, No. 1, summer 1997] -- annexed to our March 10th Memorandum. That analysis critically quotes from Chapter 5, of which Professor Burbank acknowledged himself to be the "principal author" in his May 14th testimony (Tr. 58).

The most obvious forum for Professor Burbank to defend the National Commission's Report and its study of §372(c) -- and for CJA to present to this Committee the significance of the transmitted evidentiary proof in demonstrating that the federal judiciary's unwillingness to "police itself" reaches its upper echelons, namely, the Administrative Office and Judicial Conference -- would be at a hearing on the National Commission's final Report. To date, 4-½ years after the August 1993 Report was issued, there has been no such hearing.

It was in the specific context of H.R. 1252 and the May 14th hearing

at which Committee members voiced unfamiliarity with the National Commission' Report[1] that the ABA Commission on Separation of Powers and Judicial Independence made an *explicit* recommendation:

> "Congress should hold hearings on and consider appropriate responses to the 1993 Report of the National Commission on Judicial Discipline and Removal. That process should be completed before Congress considers any proposals for additional legislation or constitutional amendments in the area of judicial discipline and removal." [ABA Report, at 59 (July 4, 1997)]

Sitting as a member of the ABA Commission was none other than Robert Kastenmeier, former chairman of the courts subcommittee and the National Commission's Chairman. In making such recommendation, the ABA Commission plainly believed that familiarity with the National Commission's Report would discourage Congress from modifying §372(c)[2]. In fact, a hearing will have the opposite effect if -- as pointed out by CJA's January 26, 1998 letter

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[1] Congresswoman Zoe Lofgren: "...frankly, I didn't know there had been a report in 1993 until this morning, either. I look forward to reading it." (Tr. 104); Congressman William Delahunt: "I mean, I'm totally unfamiliar with it. I'm not trying to be disingenuous here. I have never even heard of it until very recently." (Tr 108).

[2] The ABA submitted a written statement from its then President, N. Lee Cooper, in connection with the May 14, 1997 hearing on H.R. 1252. As to Section 4, President Cooper stated that the ABA "has no policy addressing 'venue' considerations directly", but has a "policy supporting the [1980] Act in principle". President Cooper then relied on the National Commission's study of the Act, which he called "rigorous", to tout the "informal resolutions" facilitated by in-Circuit handling of §372(c) complaints. As to Section 6, President Cooper expressed support "based on policy adopted in 1980". (5/14/97 Tr. 134-5, 136-137).

to ABA President Jerome Shestack[3] -- Congress has in front of it not the rhetorical platitudes that fill the Report of the ABA Commission and that of the National Commission, but the kind of concrete evidence of dysfunction and corruption that we transmitted to the Administrative Office -- copies of which we have now provided this Committee.

Of course, the courts subcommittee did hold a hearing on the National Commission's draft Report -- on July 1, 1993. At that hearing, the Judicial Conference was represented by U.S. District Judge John F. Gerry, Chairman of its Executive Committee of the Judicial Conference. In his written statement, Chairman Gerry assured the subcommittee that the Judicial Conference would take "appropriate action" on the National Commission's recommendations and singled out that:

> "One initial step may well be for the Conference to look into recommendations made on page 128 of the [draft] report for a review of the Conference's own committee structure in the disciplinary and ethics area..." [Tr. at 44]

The recommendations to which Chairman was referring were preserved in the final Report with only grammatical changes:

> "...the Commission believes that the judiciary would be well served by a standing committee of the Judicial Conference to monitor and periodically evaluate experience under the 1980 Act and other formal and informal mechanisms for dealing with problems of judicial misconduct and disability. Although making no specific recommendation in that regard, the Commission did note the current dispersion of authority regarding judicial ethics and judicial

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[3] A copy of CJA's letter to President Shestack -- to which the House Judiciary Committee is an indicated recipient -- is contained in the purple file folder, marked "CJA's 1/27/98 ltr to Barr". *See* pp. 6-8.

> misconduct and disability among a variety of Conference committees and the lack of any group responsible for coordinating the collection and analysis of relevant data and the development of policy proposals.
>
> Since 1991 the Conference's Committee to Review Circuit Council Conduct and Disability Orders, in addition to its statutory review functions under the 1980 Act, has been assigned the duty to monitor and report on judicial discipline legislation, to serve as liaison and clearinghouse for the circuits on their experience with the Illustrative Rules, and to make recommendations to the Conference on desirable legislative and rule changes. The Committee currently consists of two former circuit chief judges and two former district court judges. It is not clear whether the statutory responsibilities or the composition of that committee would make it the ideal vehicle for an even broader charge. In any event, any such group should include a substantial representation of district judges as well as of (current or former) circuit chief judges and, as on some other Conference committees, lawyers who are not judges could make a useful contribution." [Final Report, at 126]

The next sentence in Chapter 5 of the National Commission's Reports, both draft and final, goes on to mention a recommendation of the Twentieth Century Task Force on Federal Judicial Responsibility that "the Judicial Conference establish a representative oversight committee to review experience under the 1980 Act". Without providing the details of the Task Force's recommendation, the Reports concluded:

> "This [National] Commission's studies and recommendations, if implemented, coupled with periodic reevaluations by the Judicial Conference and oversight by Congress, meet the needs to which the

> Task Force's recommendation was addressed." [Final Report, at 127]

In fact, only the most scrupulous follow-through by the federal judiciary could have met such need -- since the Task Force's recommendation was *extraordinary*. The details were presented to the National Commission at its May 15, 1992 hearing by U.S. Circuit Judge Abner Mikva, a Task Force member who was a former member of the courts subcommittee[4]:

> "...a committee appointed under the authority of the United States Judicial Conference which would include among its members judges, lawyers, and non-lawyers. And this committee would be empowered to examine all the records of the disciplinary complaints filed in the federal courts, the supporting materials, and the disposition of the complaint. And it would be charged with the responsibility of making an annual report to the appropriate congressional committees concerning the state of enforcement of the legislation, concerning judicial discipline within the federal system..." [Hearings of the National Commission, at 252]

Such proposal had previously been presented by Judge Mikva, almost *verbatim*, to the courts subcommittee at its June 28, 1989 hearing on the bill that established the National Commission. In his written statement, offered jointly with the Task Force's Chairman, Professor A. Leo Levin[5], it had been emphasized that:

> ...such an oversight committee should be quite

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[4] The Twentieth Century Task Force also included a current member of the courts subcommittee, Congressman Barney Frank, among its eleven members.

[5] Professor Levin teaches at the same law school as Professor Burbank: the Law School of the University of Pennsylvania.

> distinct from the committee of the Judicial Conference charged with reviewing judicial council orders. The latter has an operational function; it is charged with decisionmaking in the individual case. The former has an oversight function and the two are not compatible." [6/28/89 Tr. 392-395]

Thus, the Task Force's proposal was for an independent mechanism to "audit" on an unrestricted and on-going basis, the actual records of §372(c) complaints by a membership that included lay persons. This was far different from -- and vastly superior to -- the very restrictive, one-time examination done by the National Commission, where only court-connected consultants were permitted access for review of what was deemed a "cross-section of §372(c) records [*See* "*Without Merit: The Empty Promise of Judicial Discipline*", pp. 93-94]. Moreover, the oversight commission was to have an important role in "creating a body of precedent that could prove useful in the administration of our system of judicial discipline" [6/28/89 Tr. 394-395; Hearings of National Commission 5/15/92 Tr. 253].

This Committee should be aware that notwithstanding Judge Gerry recognized that the National Commission's views on structural change within the Judicial Conference amounted to a recommendation, there has been *no* change in the Judicial Conference's committee structure dealing with ethics and discipline issues[6]. Moreover, *if* the Judicial Conference has given its Committee to Review Circuit Council Conduct and Disability Orders a "broader charge" -- the advisability of which was unclear to the National Commission -- the recommended expansion of the Committee's membership has *not* occurred[7]. Nor are there any "lawyers who are not judges" among its membership, yet another recommendation of the National Commission.

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[6] We have been unable to ascertain how much money, if any, of the federal judiciary's $3,000,000,000 budget is earmarked for oversight of §372(c).

[7] *If* it has been expanded, it is by a single judicial member

The fact that as of this date -- almost five years after the National Commission's recommendations (at 107-9) that the Circuits develop case law precedent, interpreting the §372(c) statute -- a recommendation endorsed by the Judicial Conference in 1994 -- much as it had endorsed such case law development in 1986 -- the Circuits have still not generated case law on §372(c) -- only reinforces that the Judicial Conference has failed to exercise meaningful oversight over how §372(c) is being implemented. As pointed out by CJA's article (p. 95), the federal judiciary is deliberately failing to create case law so as to keep the "merits-related" category broad and undefined and thereby dump -- in knee jerk fashion -- virtually every §372(c) complaint as "merits-related".

Since Professor Burbank asserted at the May 14th hearing on H.R. 1252 that the Judicial Conference had taken the National Commission's Report "very seriously" and had addressed "most of the problems" and its "recommendations to the judiciary" -- in the process throwing in unfavorable comparisons with Congress' response (5/14/97 Tr. 56, 59) -- he should be called upon to assess the significance of the Judicial Conference's failure to follow-through in revising its committee structure for ethics and disciplinary matters, as recommended by the National Commission Chapter 5 -- and its failure to develop case law to resolve the "substantive ambiguity" of the 1980 Act -- also recommended by the National Commission's Chapter 5. And he should explain why Congress should be satisfied in relying on an increasingly "stale" National Commission Report from 1993, rather than annual reports of an oversight committee of the Judicial Conference, such as endorsed by the Twentieth Century Task Force. In Professor Burbank's words "...there is even less basis for concern about the adequacy of the existing system today than there was before the Commission was established." (5/14/97 Tr. 56, 59).

The Judicial Conference's disinterest and disdain in providing meaningful oversight over the federal judiciary's implementation of §372(c) in the aftermath of the National Commission is *empirically* demonstrated by the file of CJA's 2-1/2 year correspondence with the Administrative Office -- in the person of Jeffrey Barr, its Assistant

General Counsel[8]. Mr. Barr is staff counsel to the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders and, according to him, the *only one* at the Administrative Office handling §372(c) issues[9]. This is in addition to his other work responsibilities, to which Mr. Barr gives priority. Before coming to the upper ranks of the Administrative Office, Mr. Barr was one of the two court-connected consultants to the National Commission, which the federal judiciary permitted to examine a supposed cross-section of §372(c) complaints. It is to Mr. Barr that CJA's article refers (pp. 96-97) when it states that presumably the federal judiciary was well pleased by his consultants' study when it promoted him to the Administrative Office.

CJA's letters to Mr. Barr are organized in separate file folders, together with their exhibits and enclosures. The initial 1995 letters are in MANILLA FILE FOLDERS and, with one exception[10], did not request Mr. Barr to bring them to the attention of the Committee to Review Circuit Council Conduct and Disability Orders. By contrast, CJA's 1996 letters, in RED FILE FOLDERS, requested Mr. Barr to present them to that Committee. This was because of the serious issues relating to the Second Circuit's dismissal of our first §372(c) complaint by an order which was dishonest, in addition to being non-conforming with the Judicial Conference's endorsed recommendation of the National Commission that dismissal orders be reasoned, non-conclusory, and, where appropriate, develop case law precedent. The background to that §372(c) complaint -- and Mr. Barr's failure to present it to the Committee -- are described at pages 95-97 of our article. As to CJA's 1997 and 1998 letters, in PURPLE FILE

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[8] The only exception is CJA's final March 10, 1998 letter, which is *also* addressed to William Burchill, the Administrative Office's General Counsel.

[9] *See* CJA's 1/27/98 ltr to Mr. Barr, p. 2

[10] *See* CJA's 7/20/95 ltr to Mr. Barr, p. 1, relative to the Second Circuit's non-compliance with filing requirements for §372(c) dismissal orders, with its suggestion that Circuits inventory and certify dismissal orders sent to the Federal Judicial Center.

FOLDERS, which transmitted two additional §372(c) complaints and the full record of the case from which they emerged, our request to Mr. Barr was that they be presented to "appropriate persons, committees, and offices in the federal judiciary" empowered to take action based on the record showing "the corruption of the judicial process by two levels of the federal judiciary, which have flouted federal disqualification statutes and the Judicial Conference's own Code of Judicial Conduct, based on the ABA Code -- as if they do not exist." (CJA's 11/24/97 ltr, p. 2)

As reflected by our correspondence, Mr. Barr's response to the shocking evidentiary proof transmitted by those letters that the Second Circuit was subverting §372(c), §144, and §455 -- as well as the judicial process itself -- was to deny their seriousness and to refuse to channel them to the Judicial Conference [*See*, in particular, CJA's 9/20/96 ltr; 11/24/97 ltr; 1/27/98 ltr; 2/27/98 ltr]. Meanwhile, the Judicial Conference was opposing Sections 4 and 6 of H.R. 1252 based on its claims as to the efficacy of those sections and the judicial process. Such dishonesty and duplicity apparently meets with the approval of William Burchill, Mr. Barr's superior, who has failed to return our telephone messages or respond to our March 10, 1998 letter, even to the extent of informing us as to what is happening with those evidentiary materials.

Although chronological review of CJA's one-sided correspondence would provide the clearest and most comprehensive picture of the mockery that the Administrative Office/Judicial Conference has been making of its responsibility to oversee federal judicial discipline, the most significant letter for you to commence your review is the first purple folder containing CJA's November 24, 1997 letter to Mr. Barr. The materials transmitted by that letter -- the full record in *Sassower v. Mangano, et al.* and the two §372(c) complaints based thereon -- are in three BROWN ACCORDION FOLDERS, marked "THE APPEAL", "APPELLATE CASE MANAGEMENT PHASE", and "POST-APPEAL PROCEEDINGS". **The importance of your review of *Sassower v. Mangano* cannot be overemphasized: both for purposes of examining the federal recusal statutes, §144 and §455, and the disciplinary statute, §372(c). The case involves no less than six recusal applications and generated two**

§372(c)complaints, each with recusal applications[11].

As reflected by the appellate Brief in *Sassower v. Mangano*, the SOLE issue presented on appeal was the "pervasive bias" of the district judge[12], including his denial of a recusal motion pursuant to §144 and §455 (#1) and of a reargument, reconsideration, and renewal motion based thereon (#2). The sufficiency and timeliness of those motions -- and the applicability of the Supreme Court's decision in *Liteky*, *supra* -- are discussed in Point I of the Argument section of the Brief (at pp. 31-37). Such argument -- as well as every other argument made in Appellant's Brief -- together with Appellant's meticulously-documented showing that the district judge's decision is a knowing and deliberate fraud -- were completely undenied by Appellees, a fact highlighted by Appellant's Reply Brief [*See* brown accordion folder, "THE APPEAL"]. Nonetheless, the three-judge appellate panel did *not* adjudicate the evidentiarily-established, legally-supported bias issue. Instead, it rendered a no-citation, not-for publication Summary Order of affirmance, which *never* cited the record once, *expressly* did not address the district judge's dispositions on *any* of the motion submissions before him (including the recusal/reargument motions), and purported to "affirm" the judgment by its own *sua sponte* invocation of the *Rooker-Feldman* doctrine -- a doctrine shown to be inapplicable to the material pleaded allegations of Appellant's Verified Complaint, ALL of which the Circuit panel purposefully omitted from its Summary Order.

This was highlighted by Appellant's Petition for Rehearing with

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[11] Our intended petition for review to the Second Circuit Judicial Council will include a further application for recusal/transfer.

[12] The subcommittee should have particular interest in the district judge whose fraudulent conduct is here at issue, since he is none other than U.S. District Court Judge John Sprizzo of the Southern District of New York -- the same Judge Sprizzo whose announced disregard of law in the case involving abortion protesters was the subject of a considerable concern and comment at the court subcommittee's May 15, 1997 hearing on judicial misconduct and discipline (Tr. 3, 9-10, 33-34, 36, 38, 40, 50, 54, 85).

Suggestion for Rehearing *In Banc*, as was the fact that the appellate panel also did *not* address -- or even identify -- the issue of its own bias, which had been the subject of a recusal application at oral argument (#3) [*See* brown accordion file: "POST-APPEAL PROCEEDINGS"]. Such application reiterated a prior motion Appellant had made -- even before the appellate panel was assigned -- to transfer the appeal to another Circuit by reason of the Circuit's bias (#4). That fact-specific motion had been denied *without* reasons by a different panel, presided over by a judge, whose disqualification for actual and apparent bias had been the subject of an affidavit objection (#5) [*See* brown accordion file: "APPELLATE CASE MANAGEMENT PHASE"].

Incorporated by reference in Appellant's Petition for Rehearing with Suggestion for Rehearing *In Banc* were Appellant's post-appeal motion pursuant to §455 for recusal and transfer (#6) -- which combined a motion to vacate for fraud the appellate panel's Summary Order and the "affirmed" judgment of the district judge -- as well as her two §372(c) judicial misconduct complaints: one against the district judge based on his failure to recuse himself and demonstrated *actual* bias and the second against the appellate panel, likewise for failing to recuse itself and its demonstrated *actual* bias. These documents juxtaposed for the Circuit either a judicial or disciplinary remedy to the misconduct of two levels of the federal judiciary that the Petition for Rehearing summarized.

The appellate panel's response was to deny, *without reasons*, Appellant's fact-specific, fully-documented recusal/vacatur for fraud motion. Similarly, *without* reasons, it denied her Petition for Rehearing and, together with the Circuit's other judges, did not request a vote on Appellant's Suggestion for Rehearing *In Banc*. Thereafter, Appellant's §372(c) complaints were dumped as "merits-related" in a dishonest and conclusory order. Such dismissal was by the Second Circuit's Chief Judge, who failed to address -- or identify -- Appellant's contention that he and the Circuit were disqualified for bias and self-interest from adjudicating the complaints, which had to be transferred to another Circuit.

The Second Circuit's subversion of the judicial/appellate/disciplinary

processes, reflected by *Sassower v. Mangano*, is shocking in its brazenness -- and especially when considering that the Circuit was on notice of the transcending significance of the case, which *expressly* raised a challenge:

> "whether -- and to what extent -- appellate review and 'peer disapproval' are 'fundamental checks' of judicial misconduct, as claimed by the National Commission on Judicial Discipline and Removal in its 1993 Report -- and whether a remedy for such judicial misconduct exists under 28 U.S.C. §372(c). This Circuit's answer will demonstrate whether judicial discipline should be reposed, as it presently is, in the Circuit." (Petition for Rehearing with Suggestion for Rehearing *In Banc*, p. 1)

Indeed, on the very first page of the Petition for Rehearing with Suggestion for Rehearing *In Banc*, as a footnote to the above-quoted excerpt, appeared the following:

> "This Circuit's answer will be part of a formal presentation by the Center for Judicial Accountability, Inc. to the House Judiciary Committee to remove federal judicial discipline from the federal judiciary, as described in "*Without Merit: The Empty Promise of Judicial Discipline*", by E.R. Sassower, Massachusetts School of Law: The Long Term View, Vol. 4, No. 1, pp. 90-97. (Annexed as Exhibit "A" to Appellant's separately-filed recusal/vacatur motion, See p. 15 infra.)" [*See* brown accordion file: "POST-APPEAL PROCEEDINGS"]

The Second Circuit's continued misconduct, in the face of such notice, set forth in a Petition for Rehearing with Suggestion for Rehearing *In Banc* -- incorporating a fully-documented recusal/vacatur for fraud motion and §372(c) misconduct complaints -- makes plain that it believes that Congress will not undertake the "vigorous oversight" it promised when it passed the 1980 Act -- oversight which the National Commission recommended when it

failed to endorse the oversight committee proposed by the Twentieth Century Task Force. As our correspondence with Mr. Barr reflects, oversight by the Judicial Conference is non-existent.

Sassower v. Mangano is stark evidence to shatter the confidence of Committee members, such as Congressman Delahunt, who opined at the May 15, 1997 hearing on judicial misconduct and discipline:

> "Fortunately, there are institutional safeguards that help the system correct itself. That is what appeals and appellate courts are for... For cases of genuine judicial misconduct, there are ample remedies available..." (at 21)

That is what the Judicial Conference would like the Committee to believe based on vague and non-verifiable claims, for which it finds a chorus in those like Professor Burbank and the American Bar Association, who seek to share in its power and prestige. Fortunately, CJA believes in the power of empirical evidence.

As reflected by CJA's transmitted correspondence, the case of *Sassower v. Field* also empirically proves the corruption of judicial, appellate, and disciplinary processes. Indeed, *Sassower v. Field* is especially noteworthy because it was presented to the National Commission on Judicial Discipline and Removal under a July 14, 1993 letter[13], as documentarily establishing not only the failure of the appellate process and "peer disapproval", heralded by the National Commission's draft Report, but the legitimacy of fears of judicial retaliation by those who would seek to complain about judges. Thereafter, in a July 22, 1993 letter (Exhibit "D"), the National Commission was *expressly* requested to designate the case as "the convincing demonstration" of the inadequacy of the 1980 Act *if* the judicial misconduct arising in that case was not cognizable under §372(c). As set forth in our article (p. 95), "the Commission refused to answer" that question.

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[13] *See* CJA's 7/20/95 ltr to Mr. Barr, Exhibit "B".

The House Judiciary Committee already has a plethora of correspondence from us about *Sassower v.* Field, beginning with our initial June 9, 1993 letter to it (Exhibit "E"). That letter transmitted the appellate Briefs and appendices in the Second Circuit and the U.S. Supreme Court[14] so as to enable this Committee to verify how a district judge's retaliatory decision -- shown on appeal to be factually-fabricated and legally baseless -- was affirmed by a fraudulent Second Circuit decision, which, *without* citing the record once or identifying a single one of the Appellants' arguments, upheld, by a *sua sponte* invocation of "inherent power", a wholly arbitrary and factually unsupported $100,000 sanctions award against civil rights plaintiffs, in favor of fully-insured defendants, to whom it was a windfall double recovery, and who had engaged in a stratagem of discovery misconduct and fraud -- as particularized by Appellants' Rule 60(b)(3) motion to vacate for fraud -- a motion which was fully-documented and uncontroverted.

As highlighted by CJA's article (p. 96), our §372(c) complaint deriving from that case was filed following a February 1996 meeting with House Judiciary counsel[15], who understood that if the Second Circuit dismissed it as "merits-related", the onus would fall to the House Judiciary Committee to undertake an impeachment investigation[16]. **Judges who, for ulterior purposes, render dishonest decisions -- which they *know* to be devoid of factual or legal basis -- are engaging in impeachable conduct.** If the Judicial Conference -- or Professor Burbank -- or the ABA disagree with this

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[14] *Seæspecially*, Appellant's Supplemental Petition for Rehearing in the U.S. Supreme Court, which was based on the Court's granting of certiorari to *Liteky* [copy enclosed with CJA's 9/20/96 ltr to Barr]

[15] CJA's March 28, 1996 letter to Tom Mooney -- then and now this Committee's Chief Counsel -- is annexed (Exhibit "F").

[16] The §372(c) complaint is contained in the red file folder marked "CJA's 6/7/96 ltr to Barr". The substantiating Supreme Court documents and Petition for Rehearing with Suggestion for Rehearing *En Banc* in the Second Circuit, which were part of that §372(c) complaint, are contained in the red file folder marked "CJA's 9/20/96 ltr to Barr."

straightforward statement, they should provide the House Judiciary Committee with a rebuttal.

Based on the *readily-verifiable* evidentiary record in the House Judiciary Committee's possession of outright fraud by the district and circuit judges in *Sassower v. Mangano* and *Sassower v. Field* -- a record that is meticulously-documented, uncontroverted, and incontrovertible -- those judges should be among the first to be so-investigated. Again, if the Judicial Conference, Professor Burbank, or the ABA disagree, let them provide a rebuttal, addressed to the evidence.

The words of Congressman Bob Barr at the May 15, 1997 hearing on judicial misconduct and discipline are a fitting close. He hoped for what every American has a right to expect of this Committee:

> "...the possibility of looking at some of the terminology that is used in our constitutions, such as 'good behavior' and looking at perhaps defining that, trying to come to grips with, What does that mean? We know it doesn't mean 'bad behavior,' but beyond that, what does it mean? And I don't think we should be at all afraid to start thinking about these things." (at p. 7)

The evidentiary materials transmitted to this Committee -- and the analysis and discussion they must engender -- will lead to a clearer definition of what is -- and is not -- "good behavior": an essential prerequisite to revamping §372(c) and revitalizing this Committee's capacity to impeach misbehaving judges.

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

cc: Judicial Conference of the United States
c/o Administrative Office of the United States Courts
ATT: William Burchill, General Counsel
Jeffrey Barr, Assistant General Counsel

ATT: Art White, Deputy Assistant Director
Office of Legislative Affairs

Professor Stephen B. Burbank

Jerome Shestack, President, American Bar Association